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ABSTRACT

In October 1970 civil rights activists sued the Department of Health, Education, and Welfare (DHEW), charging it with "general and calculated default" in enforcement of a law forbidding racial discrimination in the use of federal education funds. Subsequent DHEW secretaries have been named as defendants. This case study of the regulatory process focuses on four groups of actors and actions: (1) the actions of Congress and the courts and the target populations; (2) the academic groups expected to change their behavior (in this case the higher education system of North Carolina); (3) the regulators (HEW, and within it, the Office of Civil Rights (OCR); and (4) the black citizens' groups, the NAACP Legal Defense Fund. Legal, academic, and agency background are given through three time periods: prior to the suit, 1964-1970; through January 1977, when the director of OCR left the agency; and through January 1978, the date of publication. The case is seen as an extreme but not unique example of conflicting sources of authority in the antidiscrimination regulatory process. It is concluded that new regulatory processes must be developed that respect the structure and norms of the academic community and still guarantee that it acts in a manner consistent with social policies. Both mediation between academia and the regulatory system and participation in regulatory processes are suggested as partial solutions. Appended are an outline of a plan to eliminate a dual system of higher education; a list of DHEW secretaries, general counsels, and assistant counsels since 1964, and OCR directors since 1964; figures of black participation in North Carolina higher education; and an outline of pertinent laws. (MSE)

Sloan Commission

on Government and Higher Education

(Working Paper)

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ADAMS V. CALIFANO

A CASE STUDY IN THE POLITICS OF REGULATION

by
Crystal Lloyd-Campbell

January 1978
Revised Edition
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PROLOGUE

THE NEW YORK TIMES pages 1, 32 October 20, 1970

H.E.W. 'DEFAULT' ON INTEGRATION CHARGED IN SUIT
Civil Rights Forces Accuse U.S. of Laxity
in Use of School Funds Cutoff

By John Herbers
Special to THE NEW YORK TIMES

WASHINGTON, Oct. 19 - Civil rights forces filed a lawsuit today charging the Department of Health, Education, and Welfare with "general and calculated default" in its enforcement of a law that forbids racial discrimination in the use of Federal education funds.

The suit, sponsored by the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and filed in Federal District Court here, asked that the court substantiate the charge and issue an injunction requiring stronger enforcement.

A week ago, the United States Commission on Civil Rights, an independent Government agency, issued a long report contending that there had been a "major breakdown" in the enforcement of a vast complex of civil rights laws, including Title VI of the Civil Rights Act of 1964, which forbids discrimination in any federally assisted program....

Joseph L. Rauh, Jr., said, however, that the lawsuit had been in the works for more than a year - since July 2, 1969, when the Nixon Administration announced that it would put less emphasis on the cutoff of Federal Education funds as authorized under Title VI....

Mr. Rauh said the suit was to have been filed last August but was held up at the request of Mr. Richardson, who had just taken over as Secretary and who wanted to open a dialogue between civil rights lawyers and his department. Meetings were held but apparently no understanding was reached.

Title VI has been described as the "atomic bomb" of the civil rights arsenal. It could be used wherever Federal funds go, which, under the system of Federal grants-in-aid, is almost everywhere.

The Johnson Administration used it only in a few areas - chiefly to speed school desegregation, which was proceeding at a slow pace through the courts, and in the integration of hospitals and other health facilities.

Under the class-action lawsuit filed today, only the Government's action in regard to education is challenged. The plaintiffs are 25 elementary, secondary and college students in public schools in Mississippi, Louisiana, Tennessee, Virginia and Arkansas....

The suit said the fund cutoff had never been applied against colleges nor had much effort been made to require colleges, which are drawing a variety of Federal funds, to proceed with desegregation. The suit cited a list of Southern cities, each having a virtually all-black and a virtually all-white state college side by side, offering similar and overlapping courses....

The suit also contended that department had failed to take any action against state departments of education that encouraged school districts to violate desegregation regulations. (Emphasis added)

In 1970, a coalition of black academics, citizens, students, parents and taxpayers, dissatisfied with the enforcement of Title VI of the Civil Rights Act of 1964 by HEW, brought suit against the Secretary of the Department of Health, Education, and Welfare.

Legal case style lists multiple plaintiffs alphabetically. Case reports, therefore, record this case as Adams v. Richardson, Secretary, Department of Health, Education, and Welfare.[1] The legal relief requested by the plaintiffs was the issuance of a court order requiring the Department and its subsidiary agency, the Office for Civil Rights (OCR), to get on with its mandated job: enforcement of the federal antidiscrimination law, Title VI of the Civil Rights Act of 1964. Ten states were specifically named in the complaint against the Department, but they were not named as defendants in the action.

In the seven years since the Adams suit commenced, three other secretaries of DHEW were, in turn, named defendants in this action. Some of the original ten states are no longer associated with the case. Six of the original ten are still affected by the Title VI regulatory process which started before the suit and continues to this day. One of the six is the state of North Carolina. Final decision in this case may be far in the future.

The particular focus of the case is desegregation of institutions of higher education. The regulatory process which has occurred as a consequence of this suit -- the administrative agency and

academic interaction -- is the subject of this case study into the regulatory process.

Perhaps law and institutional perceptions helped tangle the events of the past eight years. Some perspective on these events is necessary for our analysis. The case study of the regulatory process focuses on four groups of actors and actions: the actions of Congress and the courts and the "target" populations;[2] the academic groups expected to modify their behavior (in this instance the higher education system of North Carolina); the regulators (the Department of HEW and within it the Office for Civil Rights); and the black citizens groups (those interested in increasing the flow of egalitarian policy, the NAACP Legal Defense Fund). Legal, academic and agency background will be developed, through three periods of time: events prior to the suit 1964-1970, events through January 1977, and events of the past year, through January 1978.

Two Opposing Views

1. PEER Report, November 1977:*

In its role as the protector of the rights Congress guaranteed in Title IX, HEW has three basic responsibilities:

- to inform the public of rights now guaranteed under the law, and let educators know about their responsibilities;
- to investigate charges brought by citizens who have been damaged by, or know of, violations of the law, and to correct those violations in a reasonable time;
- to initiate checks in...schools to (assure)... opportunities...equally to...women and men.

By all the evidence we could find, HEW has failed to fulfill its responsibilities on all three counts.

Anyone can send HEW a letter about a violation of Title IX. Complaint letters go to one of HEW's regional offices,.... According to HEW regulations, the office should acknowledge each complaint in writing; notify the school...of the charges; and promptly investigate the charges. HEW is obligated to keep the complainant's identity confidential, unless revealing it is essential during the course of an investigation. Once someone has filed a charge, the government is responsible for taking it from there. The complainant is not obligated to document the charges. Nor is the complainant party to negotiations between the government and a school district once discrimination is found.

* "Stalled at the Start: Government Action on Sex Bias in the Schools," Project on Equal Education Rights, NOW Legal Defense and Education Fund, pps. ii, 15 (footnotes omitted), November 1977.

* * * * * * * * * * *

2. Kershaw Report:

A second general consideration is that the general policies the federal government's laws and regulations are trying to promote -- equal rights, nondiscrimination...are goals with which almost all educators are in sympathy....government and education... have been in disagreement about procedure rather than about principles of legislation.

* * *

There remains the question of whether it all makes a difference. *** There is some indication that,...many institutions feel that the new hires they end up with are not significantly different. One first rate small college department that has traditionally hired at the elite universities hired six people last year; despite heroic affirmative action efforts, it ended up with six white males, from Harvard, Yale, Pennsylvania, Berkeley, and Wisconsin.... Ten years ago it would have been the same.

* * *

We have suggested that on balance affirmative action and equal opportunity have been sympathetically received. There is one exception to this to which almost everyone in higher education reacts adversely, frequently with fervor. Any woman or black who feels aggrieved may drop a card to one of the enforcement agencies, simply stating as much. This sets in motion a series of steps which have to end with the institution proving its innocence, or suffering a penalty. *** All but the smallest institutions...have stories to demonstrate this point; and many of them are inexcusable.

Kershaw, Government and Higher Education -- A Survey of 21 Institutions, Sloan Commission on Government and Higher Education, 1977.

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INTRODUCTION

This paper is a study of the interactions of a particular regulatory process in a particular setting: antidiscrimination and higher education. Although antidiscrimination regulation of education may have attracted more notoriety than regulation in other areas, it is not unique. Nondiscrimination policies are broad instrumental policies aimed to affect existing patterns of behavior in many contexts -- industrial, social and academic. Viewing the regulatory process in the particular academic setting will, therefore, touch upon some universal problems of regulation and institutional change in American society today.

Antidiscrimination regulation and higher education are traveling on a collision course. The end result may be anarchy. While legal mandates have the appearance of clarity, agencies are unable to enforce them and academia finds compliance costly (in time, money and energy) and ineffective; therefore, to some extent academia ignores it. The special interest groups whose expectations were heightened by the enactment of protective legislation are disillusioned and cynical.

The gap between theory and practice is threatening to engulf legal institutions. Each participant in the regulatory process has a different perspective. The Kershaw report and the report sponsored by the National Organization for Women, the PEER Report, discuss the same issue -- the means by which antidiscrimination laws are enforced -- but from radically differing perspectives. For PEER, the problem with the simple letter complaint mechanism (a post-card, for

instance) which Kershaw dislikes is that its simplicity is frustrated by agency inaction. Academics find that same complaint mechanism swamps the institutions in unnecessary and burdensome red-tape, paperwork and litigation, threatened or real. For one, too much enforcement; for the other, too little. Perhaps the only interest group benefitting from all the increased regulation of higher education are the members of the legal profession, the lawyers who draft, implement, enforce, counsel and litigate the vast body of antidiscrimination law and regulation.

Antidiscrimination regulation includes constitutional equal protection, statutory nondiscrimination and regulatory affirmative action. It is an ambitious attempt to make the American ideals of equality and individual freedom operational realities. For courts and Congress, the traditional goal of antidiscrimination policy has been to eliminate certain group identifications which historically have been used to disqualify individuals in education, occupation or residence. Discriminations based on race, sex, class, ethnic origin, (and now add age and physical condition) are no longer viewed as consistent with the American goal of providing equal opportunity for all.

Equality of opportunity, however, is a slippery concept. Like Henry Maine's often quoted observation concerning legal history -- as a movement from "status to contract"[2a] -- the aim of antidiscrimination policy was to provide opportunity based on individual merit, unfettered by group identification.

Maine's observation may be more appropriate to 19th century contractual laissez-faire than today's consumer protectionism where

the manner of regulating antidiscrimination (affirmative action) may actually focus on group identification rather than individual merit. While one group struggles to eliminate discrimination and provide equality of opportunity, another group (the victims of discrimination) measures achievement of this antidiscrimination goal in terms of the same discriminatory classifications that courts and Congress, until recently, had tried to eliminate. Thus, application of the equality principle becomes, in operation, regulated affirmative action, utilizing formerly disfavored classifications to measure the success of the equality policy. To some this appears to be a Catch-22 situation; to others, overdue reparations.

Antidiscrimination policies apply across the broad spectrum of American life, but they have had particular and close identification with education from their inception and throughout recent history. The constitutional principle of equal opportunity was revitalized and reshaped in the historic 1954 Supreme Court decision, Brown v. Board of Education, which held that discrimination in educational opportunity based on racial classifications violated the equal protection clause of the 14th Amendment. A decade of court suits followed: in each the focus was on equality in public education. In 1964, Congress converted equality and opportunity from judicial themes into national policy. The 1964 Civil Rights Act continued to forge a link between nondiscrimination policy (Title VI) and equal education opportunity.[3] Since then, several widely publicized law suits involving public school systems throughout this country have combined constitutional and congressional policy with

judicial power to shape aggressive affirmative action remedies, furthering the goal of equal opportunity in education.

Notwithstanding the close identification of education and equality, direct agency regulation of higher education to further post-1954 antidiscrimination policies has been slow to develop. Before 1970 the enforcement of nondiscrimination policies and affirmative action activities which now affect higher education took place in connection with employment. Acting under White House directives,[4] the Department of Labor required government contractors (including universities) to survey all job categories to bring employment representation (on the campus) on a parity with the racial (and later sex) composition of the available labor pool for that category. Later, the Equal Employment Opportunity Act of 1972 enlarged Title VII's[5] (equal employment opportunity) nondiscrimination employment policies to include higher education administrative and faculty personnel. Thereafter, HEW became the chief enforcement agency for Title VII employment policy as it affects institutions of higher education. On the whole, enforcement of antidiscriminatory employment regulation has been accomplished through compliance reviews and adoption of voluntary "affirmative action" employment plans such as the one negotiated with the University of California, in 1974: the "Berkeley Plan" became a model for efforts to increase minority and female representation on campus.

In this regulatory scene, the legal and legislative victories of the 50's and 60's benefitting minority groups, lapsed into an

administrative regulatory chaos of lax and erratic enforcement measures. The Adams suit arose out of this background.

The implications arising out of the Adams case and the potential impact on the academic institution are vast. To date, with the exception of certain affirmative action regulations -- such as faculty hiring and equalizing athletic opportunities for women -- most regulation of higher education has imposed a financial cost burden or a paperwork burden on academia but has not affected the fundamental elements of the traditional system.

The Adams case is different, and it raises profoundly disturbing issues. The implications arising out of the regulation and regulatory processes in this case reach to the heart of the university system as we know it. The traditionally autonomous functions that characterize academia -- such as admissions policies, faculty selection, curriculum and academic standards -- are at stake in the outcome of this situation. The basic issues are role and control: what is the role of public higher education in American society and who shall control such education: the academy or the government?

This report will not be able to answer these grave and disturbing issues; that is the mission of the Sloan Commission. But a study of organizational behavior and the regulatory process in a particular instance will illuminate why academia stands at the brink.

It has been suggested that education, like other industries, faces increasing regulation because of its failure to regulate itself.[6] But the definition of failure and the ascription of its

causes will vary according to the perceptions of the beholder. One person's failure is another's success -- depending on who and how the evaluation is made.

Investigating the antidiscrimination regulatory process -- agency action and academic reaction -- highlights the issue of control and varying perceptions. To borrow a phrase: "where you stand is where you sit."[7] One preliminary observation may provide the basis for distinguishing regulation of industry from the higher education situation. Every actor in the Adams situation -- minority plaintiff, political administrator, establishment academic -- believes in the goal of providing equal opportunity. Defining the proper goal, then, is not the issue. Each actor, however, has a different perception of how and when this goal can be achieved. In terms of equality of opportunity, the issue for education is not ends, but means.

A scene of regulation: The period from January 20, 1977 to July 5, 1977 was an active one for the new personnel at HEW. Peter Libassi, General Counsel to the Department and close advisor to the Secretary, Joseph A. Califano, Jr., led a departmental task force in developing a set of criteria -- guidelines for the states subject to regulation because of the Adams litigation. Earlier, in January, the Adams court, exasperated by the agency's actions in the past, ordered HEW to draft criteria which would set some uniform standards for the states as they prepared new desegregation plans for their state educational systems.

The HEW effort to draft these criteria was unique. Libassi had the lead responsibility, but the final result reflected the collected efforts and inputs of several offices responsible for education policy within the department.

But the General Counsel is not responsible for implementing Title VI policy; OCR is. After the criteria were filed with the court, Libassi met with each of the six states to discuss the criteria and to introduce the state educational personnel to those responsible for implementation of Title VI policy and evaluation of the state plans for desegregation. One such meeting occurred in Washington, D.C., the morning of July 21, 1977.

For a moment we shall freeze the action and capture a slice of the regulatory process in still motion.

A blinding hot day in mid-July 1977: several people gather in a large, government-sterile conference room in the Office for Civil Rights, Department of Health, Education, and Welfare. The meeting marks yet another round in federal regulation in the enforcement of Title VI antidiscrimination policy and higher education. The parties are not strangers to one another. Some of the participants have been struggling with this matter, in one form or another, since 1969. Others, new faces in agency roles, are part of the incoming administration.

The conference table is very large: too large, since by separating the groups involved their adversary roles are exaggerated. At one end of the table is a group representing public postsecondary education for the state of North Carolina, including William Friday, President of the University of North Carolina System (UNC); Ben Fountain, president of that state's community college system; Dr. Raymond Dawson and Dr. Cleon Thompson, vice presidents of UNC. At the other end of the table are five or six members of the OCR staff. Midway on one side is David Tatel, the recently appointed Director of OCR; and next to him Burton Taylor, responsible for OCR's evaluation of higher education efforts. Sitting across from them is Peter Libassi, General Counsel for HEW.

The meeting marks the transfer of authority from the policy developers to those responsible for implementing and enforcing the policy: passing the mantle from the office of the General Counsel to that of the Office for Civil Rights. Earlier in the month HEW submitted to the Federal District Court in Washington a set of criteria: guidelines for higher education to follow in a continuing effort to erase the effects of past discrimination within academic institutions. The criteria state the desegregation goals for six states whose public systems of higher education are the subject of Title VI enforcement procedures. All six states were formerly segregated by law, and all have institutions which historically separately served white and black students. All six states must develop state higher education desegregation plans based on the goals and objectives stated in these criteria. The HEW criteria touch on many issues of primary importance to academia -- faculty, students, programs -- all with the aim of eliminating vestiges of past discrimination and the former dual systems of public education. The criteria state goals for the states to strengthen the historically disadvantaged black institutions and achieve better racial balance throughout the public systems.

However general agreement there may be in the ends to be achieved in this effort, common to any broad policy directive lies the problem of choice and decisions between competing values and goals. Implicit in the criteria is the general issue of decision, choice and finality. But this dilemma of choice is submerged in the broad, sweeping outlines of these Title VI guidelines.

The meeting starts cordially but formally; a stately dance. Friday addresses the group, stating what North Carolina has done, is doing, and will do, to meet the general objectives of the federal antidiscrimination policy. He ends, however, by saying that some of the criteria cannot be met; the state cannot comply.

There is silence in the room. Then others in the delegation speak: dollars; projections; state tuition policy; federal student aid policy; drought (this summer is one of the driest and hottest in years) and its possible impact on academic enrollment in an agricultural state; the problems of the loose confederation of community colleges; tuition increases; state financial assistance and the competition from private colleges (not subject -- yet -- to Title VI proceedings); high school drop-out rates. In the quiet tan of government walls, academic administrators shape the dimensions and hard realities of managing state public systems of education which are costly for participants and states alike.

Libassi speaks; gentle, conciliatory, he attempts to clarify the HEW criteria, modifying some of the regulatory language, hoping this will help North Carolina in the development of their plans. But Libassi, instrumental in developing the policy criteria, must withdraw; enforcement and implementation are Tatel's responsibility. Libassi states his view of the goals and good faith commitment and asks Tatel for his understanding on these issues.

Tatel speaks. Gradually the discussion becomes less general, more specific. Friday raises a question about the criteria and the meaning of "eliminate educationally unnecessary program duplication" in connection with a specific problem: A recent report has identified two nursing schools ten blocks apart. Graduates of one have a 100 percent performance rate on the state qualifying exams; graduates of the other, only a 40 percent passing rate. Only when Tatel speaks is the former identified as traditionally white and the latter traditionally black.

Friday: As an administrator, what do I do? Raise admission standards? Close the nonperforming school?

Tatel : (Pausing) Merge the institutions.

Friday: Merge black into white?

Tatel : No. Merge the white into the black.

Friday: How?

Tatel : Move the institution ten blocks south.

Friday: But suppose they won't go?

Silence again. During the interchange the two men have turned directly facing one another, their respective staffs behind or beside them. It has taken about forty-five minutes for the parties, through repeated framing of the same questions, to develop their opposing views. The latent issues of regulation of higher education are suddenly exposed: academic values and norms; institutional autonomy; education opportunity and its costs; federal-state relationships; courts and regulatory process. Who is going to make the educational judgments for these public systems of higher education? And how?

Libassi attempts to reassert the spirit of mediation, the agency as assistant -- not adversary -- to help the state through a difficult period. He makes clear, however, that the action ball is in higher education's court; autonomy begins at home or assistance becomes direction.

Having touched many issues, eventually the meeting breaks up amid handshakes and pleasant goodbyes. The submerged issues of decision and control have been exposed but not addressed. The narrow regulatory focus of the meeting -- a state plan for desegregation -- reasserts itself, but the tensions caused by these latent issues continue to this day.

One further snapshot: After the meeting, some North Carolina journalists enter. Footage for the evening news report is filmed, then reporters question Bill Friday about the meeting. President Friday -- administrator; lawyer: above all, able politician -- thinks the meeting "was good." "People at HEW are listening to the needs of the state." Finally, the crucial question: "Who has the final say?"

Friday: There are still some open differences between us...I have told HEW that we must be able to make the decision on educational terms in the final analysis.

One can see the headlines in the North Carolina newspapers the next morning: FRIDAY TELLS HEW N.C. TO HAVE FINAL SAY.

Peter Libassi has left, but several HEW staffers remain to watch the scene. They leave as the reporters pack up, and as they walk down the hall toward their offices one staffer mutters, "Bulls--t; all bull." The others laugh. The politics of regulation is in full swing.

Law and Logic

Something went wrong here; why? Well-intentioned people entered the conference room expectantly and left with their suspicions aroused. The spirit of mediation was lost to an adversarial joust. The purpose of this case study is to examine some of the forces which cause antidiscrimination regulation of higher education to go awry and leave all the parties weary and bitter.

The effects of law and logic are influencing the scene. The actions here are the results of choices and decisions. The actors in this scene react to each action and interact with each other based on their interpretation and evaluation of the behavior of others. This behavior is perceived to be the result of conscious, purposive, rational choice. Each actor, (and the reader, too) analyzes actions in a framework of rationality.

This "ethic of rationality"[8] is a fundamental part of our American culture. Instinctively in our interpretation of actions we search for the rational explanation, assuming every act is purposive and justified by a means-end analysis. But there is a fallacy in a rational action model[9] which is apparent in the brief July scene. Too often the analysis is built on assumptions that "my logic is yours." Such explanations may be internally consistent within the interpreter's system, but not as part of the actor's system. Depending on the perceptions of the interpreter, then, actions are viewed as "logical" and are applauded; or they are considered inconsistent with the observer's logic and hence viewed as "political." Regulatory politics, then, is a microcosm of the politics of the democratic process.[10]

Each actor in this study is framed by institutional and experiential conditions which mold his vision of the rational world and shape this means-ends analysis. Therefore, the logic of any system is relative to its institutional premises and operational constraints and experience. To understand the processes of regulation and higher education, therefore, we have to place these actors within some institutional framework. This framework will give the needed dimension to the interactions of the regulatory process.

Law, as well as logic, may be a disruptive force here. A singular aspect of the Adams situation is the tension and interaction between court and regulatory agency. The state systems of higher education are the game pieces between the two. There is therefore an undeniable legal focus to these events. The entire history of antidiscrimination regulation reflects that focus. The Civil Rights Act of 1964 was a congressional reaction to the Brown decision of 1954. The academic institutions discussed here are also affected by a series of court decisions, the Adams cases.

Any analysis of events and actors cannot ignore the increasing element of judicial process in governmental activities and our social fabric. Professor Neustadt made the observation in the sixties that "we are a government of separate institutions sharing powers."[11] This may still be true, but it might be more accurate to describe the judicial as the first among equals.

The complexity of the operations of our social system has created a crisis of choice and a dilemma of decision. In frustration

we have increasingly relied on courts, the institution which cannot avoid making a decision.

Courts have moved from the particular to the general, from the business of resolving individual disputes to resolving societal disputes. "The view has gained ground that the judicial power is....coterminous with the governmental power."[12] The reasons advanced for this shift to the judiciary are many and varied. Some see it as a necessary response to inequities of majority politics and others as a decisional "economy of means" in a world of multiple choices. But whatever the cause, this tendency to lay social problems on the court doorstep may, in the long run, create more problems than it solves.

The courts, therefore, have become society's problem-solvers and the functional structure of government has been affected. Other institutions have borrowed (or been subjected to) the techniques of legal decision-making. Education has been a primary subject of this increasing judicial involvement. Legal procedures now pervade academia and agency, and lawyers are the managers of both. Undoubtedly, legal proceduralism protects the individual -- but, perhaps, at the cost of a sense of community; decisions are now viewed as adversarial choices rather than compromises arrived at through mediation.

In this presentation of the Adams case, dramatic imagery is borrowed throughout: actors, acts and actions, players and scenes. A melodramatic effect is not intended, but the idea of continuous

action, on stage and off, is important. Of necessity, events which in fact occurred simultaneously are presented serially and sequentially. The organization, therefore, presents its own logic. And we start with the law.

BROWN V. BOARD OF EDUCATION OF TOPEKA
345 U.S. (1954)

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they have been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in *Plessy v. Ferguson*, 163 U.S. 537. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction. Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was

generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. The doctrine of "separate but equal" did not make its appearance in this Court until 1896 in the case of *Plessy v. Ferguson, supra,* involving not education but transportation. American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the "separate but equal" doctrine in the field of public education. In *Cumming v. County Board of Education,* 175 U.S. 528, and *Gong Lum v. Rice,* 275 U.S. 78, the validity of the doctrine itself was not challenged. In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. *Missouri ex rel. Gaines v. Canada,* 305 U.S. 337; *Sipuel v. Oklahoma,* 332 U.S. 631; *Sweatt v. Painter,* 339 U.S. 629; *McLaurin v. Oklahoma State Regents,* 339 U.S. 637. In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt v. Painter, supra,* the Court expressly reserved decision on the question whether *Plessy v. Ferguson* should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike *Sweatt v. Painter,* there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal education opportunities? We believe that it does.

In *Sweatt v. Painter, supra,* in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In *McLaurin v. Oklahoma State Regents, supra,* the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ". . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of the child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.

Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson,* this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term. The Attorney General of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as *amici curiae* upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954.

It is so ordered.

(footnotes have been omitted)

[Reprinted from Kluger, Simple Justice, pps. 779-782.]

THE BACKGROUND, 1954 - 1970: CONSTITUTION AND COURT; CAMPUS AND CONGRESS

The Constitutional Principle

It's one matter to develop law on social issues; it's another to develop a common understanding of its operational meaning. The participants -- campus, Congress, court and complainants -- share a common heritage in the legal developments, but there is no common interpretation of the law's intended impact. This should not be surprising: the road from serf to freed man, from segregation to nondiscrimination, has been agonizing for courts and country alike.

There are three focal points in the development of the legal background to the Adams case. The first is the Constitution; the second, federal statute (Title VI of the Civil Rights Act of 1964); and the third, interpretation (particularly judicial) of statute and precedent.

The Constitution states general guiding principles, but people must give those principles life. The historic role of the Supreme Court is to be the final arbiter of constitutional content. Therefore, in part the opposed concepts of segregation and antidiscrimination are the product of the Supreme Court record: Plessy v. Ferguson;[13] Bakke v. The Regents of the University of California;[14] the turning point is the epochal case, Brown v. Board of Education.

The Plessy case constitutionalized segregation; 14th Amendment equal protection was held satisfied by provision of "separate-but-equal" facilities. Separate but equal railway cars (Plessy) is one thing; education is another matter. Nevertheless, in two later

cases the court applied the doctrine to public systems of education.[15] It took fifty years to erase the doctrine of segregation from education.

Interestingly, the main challenge to the Plessy doctrine came from several higher education cases.[16] In each of these cases the court, without reexamining the underlying principle of separation, held the state was not providing equal graduate facilities -- although undeniably they were separate. Separate but equal was proving an expensive and elusive standard for higher education and the country.

In Brown, the Court reexamined the principle and found it wanting: Separate educational facilities were held to be "inherently unequal." The maintenance of such segregated public educational systems through state mandate, by legislation or other "state action," violated the equal protection clause of the 14th Amendment. Likewise in a companion case the Court said, the 5th Amendment's "due process" clause prevented the federal government from supporting segregation policies (in the schools of Washington, D.C.) henceforth forbidden to the states under the Brown interpretation of the 14th Amendment.[17]

Brown is a momentous case, not only because of its reinterpretation of constitutional command but also for its implications for the role of the judiciary in shaping social behavior. Precedent fell, federal-state relationships were altered; court and legislature, functionally separate institutions, appeared to share equal power.

Such fundamental changes are not easily accepted. After Brown, in case after case, the Supreme Court was called upon to reaffirm the constitutional duty to desegregate formerly separate facilities. Finally, in Green v. County School Board,[18] the court declared that the goal of the Brown principle was achievement of a "unitary, nonracial system of public education," and that the states had an "affirmative duty" to convert former dual systems to unitary systems "in which racial discrimination would be eliminated root and branch."

Change based on individual private suits is institutional change by attrition: slow, tedious and costly. The courts were overwhelmed by the Herculean task, the forces of resistance ever more inventive.

Presidential power was envoked to ease the pressure on the courts. As far back as the Roosevelt presidency a link was forged between receipt of government funds and federal antidiscrimination policy goals. Executive orders bound government contractors to observe nondiscriminatory employment standards. In response to the increasing pressure on the courts, Presidents Kennedy and Johnson issued revised executive orders[19] to enable federal regulatory agencies to supplement private enforcement efforts. These orders were aimed at eliminating discrimination in federally funded housing projects and employment discrimination in government funded construction projects and by other government contractors. Until the late sixties, however, such executive orders did not have much impact.[20] In the early period of public school desegregation efforts,

few educational systems were federal contractors as defined in these orders. By the mid-sixties, when a revised executive order, Executive Order 11246, reorganized and expanded government contractor antidiscrimination efforts and more links between federal funds and educational systems existed, other enforcement tools were also available.

In the early sixties, however, case and contract were not enough to eliminate "inherently unequal" separated educational systems. Presidents, congressmen, academics and disadvantaged minorities pressed for a federal solution to immovable situations at the state and community level.

> *...there are almost as many segregated school districts in late 1963 as there were at the end of 1959. In short by running hard we have succeeded in standing still.*
>
> *Congressman McCulloch, H.R. 7152*
> *H. Judiciary Comm. Rept. 914, Part II,*
> *88th Congress 1st Session, 1963*

> *The great majority of American children attend schools that are largely segregated -- that is, where almost all of their fellow students are of the same racial background as they are. Among minority groups, Negroes are far the most segregated.*
>
> * * *
>
> *In its desegregation decision of 1954, the Supreme Court held that separate schools for Negro and white children are inherently unequal. This survey finds that, when measured by that yardstick, American public education remains largely unequal in most regions of the country....*
>
> * * *
>
> *Education is a continuum -- from kindergarten through college -- and increasingly public school desegregation plans are having an impact on colleges in the same area, particularly those colleges which are city or State supported. Free tuition...has no meaning for members of minority groups who have dropped out of school in high school and little meaning for members of minority groups whose level of achievement is too low to permit work at the college level.*
>
> *James Coleman, Report on Equality of Educational Opportunity (1966) pps. 3,33.*
> (emphasis added)

The Federal Solution: Title VI of the Civil Rights Act

President Kennedy proposed a federal solution. He submitted a strong federal civil rights law to Congress in February 1963. In the aftermath of Kennedy's death, Johnson pressured Congress to enact this Kennedy program. The Civil Rights Act[21] was passed by Congress in the fall of 1964. This sweeping antidiscrimination legislation covered voting rights, public facilities, employment opportunities and education. The primary purpose of the federal statute was to relieve the increasing judicial strain and take the Supreme Court "off the hook" by substituting a federal remedy for violation of a statutory nondiscrimination standard, thereby removing the necessity for the Court to reach for constitutional due process and equal protection principles in every discrimination case.

The several provisions relating to education attest to this purpose. Congress ordered the Office of Education to make a study to help determine the content of "equal educational opportunity": (the 1966 Coleman Report was the result of this effort). The attorney general was authorized to sue segregated public educational systems and Title VI, borrowing from the federal contractor concept of presidential executive orders, states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any program or activity receiving Federal financial assistance.[22]

Although most of the prior commotion arose out of desegregation efforts at elementary and secondary school levels, it was clear

that this nondiscrimination standard was to apply to systems of higher education, too. Kennedy's initial message to Congress mentioned the efficacy of federal funding sanctions to achieve cooperative desegregation of Southern universities. Congress stated: "billions of dollars of federal money" are granted by federal agencies for university research, although "a number of (such) universities...continue to segregate their facilities to the detriment of Negro education." [23]

The Title VI statutory scheme is relatively simple. Federal money is not to be used to further or maintain discrimination, and every federal granting agency is required to issue regulations consistent with this nondiscrimination goal. The sanction for violation of the nondiscrimination standard is termination of the federal funds. However, any federal agency must attempt to obtain voluntary compliance with this standard prior to instituting official administrative noncompliance proceedings which result in fund termination.

The Civil Rights Act was intended to provide a federal remedy, not create a new category of crime and punishment. The duty to undertake voluntary negotiations is consistent with this remedial approach. Similarly, the remedy -- fund termination -- is limited to the "political entity or part thereof" and the "particular program or part thereof" where noncompliance has been found. Congress did not wish to "punish" innocent citizens, particularly children, because of discriminatory attitudes of state public officials.

Rhetoric, agency and academic, has tended to obscure this pinpoint remedial provision by stating that all federal funds to the institution are at stake in such proceedings. A federal court recently rescued this pinpoint remedy from such overstatement:

> Once a finding of noncompliance has been made, funds are terminated only to the extent that they are used in, or support programs which practice discrimination. Other programs or activities free from the taint of unequal treatment may not be condemned along with the blameworthy. Federal funds flowing to these programs, and to their innocent beneficiaries, must not be terminated.[24]

How wondrous are the ways of law and politics. In Brown, the Court joined the concept of nondiscrimination to the due process/equal protection clause, an instrumental concept which many historians argue goes beyond the original intentions of the 14th Amendment.[25] And in Title VI of the 1964 act, the Eighty-eighth Congress restored nondiscrimination to federal statute, a phrase which the Thirty-ninth Congress had consciously eliminated from the Civil Rights Bill of 1866. Thus the democratic system grows and changes through judicial and political choice.

When the application of law is affected by politics, however, some fundamental notions about the power of law to command obedience are eroded. The Title VI regulatory process illustrates this dilemma.

Title VI expressed its legal standard in very brief and general terms. The content of impermissible discrimination is not stated. Therefore, the assumption is that Congress intended to codify the developing common law definition, subject thereafter to the rules and regulations to be issued by each federal agency.

But in Title VI the power to issue regulations has an unusual twist. According to the statute, the rules and regulations issued by a department secretary or agency director were not "effective" until approved by the President. Furthermore, once an agency made a decision to cut off funds based on its noncompliance proceedings, the head of the department or agency must file "a full written report of the circumstances and grounds for such action" with the committees of the House and Senate who have "legislative jurisdiction" over the program or activity. "No such action [termination] shall become effective until thirty days have elapsed after the filing of such report." [26]

Separate institutions sharing powers leads to decisional politics: a constant theme in the antidiscrimination regulatory process. Final authority for issuing regulations normally lies with the head of the department affected. But Congress had some political reasons for creating this overlapping jurisdiction. First, the President's office led in linking federal fund termination to antidiscrimination goals, and Congress did not want to appear to curtail the President's executive authority.[27] Secondly, since several different agencies were to issue these regulations, it was logical to entrust final approval of all such regulations to the one person having overall supervisory authority; only the President fills that role. Thirdly, since the statute, taken as a whole, was intended to take some "heat" off the Supreme Court, Congress wanted the President to share some of the heat of desegregation politics. The statutory interaction between regulatory agency, President and

Congress emphasizes this "sharing" concept. And finally, presidential approval assures that Title VI regulations are "politically" reasonable and not the mere exercise of agency zealotry.

In 1974, President Nixon delegated his power to approve Title VI regulations to the Attorney General of the United States.[28] Although this may have been premised on the Attorney General's duty to enforce the civil rights laws in the courts, it has not affected the basic problem of "overlapping powers" and in fact it may have made the situation worse. The Attorney General has a close relationship to the President and therefore shares the policies of the presidential constituency. Furthermore, the Department of Health, Education, and Welfare and the Department of Justice do not have identical, or perhaps even close, views on Title VI civil rights policy or enforcement.[29]

Overlapping jurisdictions may lead to decisional deadlock and political inaction, particularly when the choices involved are difficult and complex. This has occurred in the regulation of higher education under Title VI. The Department of Health, Education, and Welfare was to issue such regulations for all the educational programs funded under its various authorities. By 1970, the time when the discouraged black citizens brought suit against the agency (the Adams case), HEW had in fact issued (with presidential approval) such regulations with respect to elementary and secondary systems of education, including guidelines which defined and interpreted desegregation compliance requirements and procedures within such school systems.[30] In that instance, years of case law

development stood behind the regulatory standards. The court had taken the "heat" off the agency and the President.

No such layers of case law surround the desegregation process for higher education. And to date, no desegregation regulations have been issued by the department to guide higher education through this difficult process. The department came closest to issuing such guidelines when it submitted criteria for the elimination of racial duality in higher education to the Adams court in July of 1977.

The substance of the criteria will be discussed later, but two points are immediately relevant to the dilemma of jurisdictional politics. The first is to note that court-ordered guidelines are not regulations. They were not written with the public participation required by formal or informal rule-making. Further, the intent of Congress to involve the President or his designate is avoided. Once again a court has "taken the heat" in a complex decisional process, one where no other institution was willing or able to make a final choice.

The second point concerns overlapping jurisdictions: in Title VI, between agency and Congress; in the Adams criteria, between state academic officials and the regulatory agency. There is a clear political tension in the requirement that the executive branch submit fund termination decisions to Congress prior to termination. A similar tension surfaces many years later in the Adams criteria. Section I.F. of the criteria (see Appendix A) requires that a state higher education desegregation plan must "commit the state to advise OCR of proposed" academic changes prior to their formal adoption by

the state whenever such changes may directly or indirectly affect (without defining that judgment) the goal of desegregation. Regulator and academic view this requirement very differently. The inherent tension between state and federal institutions in this situation is a mirror of the tension between executive and legislative institutions at the federal level. But neither group, academic or regulator, fully appreciates the similarity of their political dilemma.

One more point: to date the federal fund cut-off remedy of Title VI has never been applied against an academic institution.

Two Perceptions of How It Was:

Public education, in fact, had been strongly resisted by the antebellum South even as the idea grew in the North and in the frontier states, where it was seen as a great uplifting force and harbinger of a bright future. The values that Horace Mann, Henry Barnard, and other apostles of compulsory common-school education preached in the first half of the nineteenth century—the school as the seedbed for civic-mindedness and a sense of national unity, for the spread of humanitarian and egalitarian values, for the homogenization of immigrants and all the varying religious and racial strands of the people, for enhancing human efficiency and building a wiser electorate in a land where universal manhood suffrage would be practiced—were almost all unwelcome in the plantation South. Elitist planters were no more inclined to send their offspring to school with the children of the white rabble than they were to put rebellious thoughts in the heads of their enslaved darkeys by providing them with even the most basic sort of formal education. A broad-based, well-informed electorate with all sorts of fool notions about the equality of men was about the least appetizing prospect the masters of the pre-war South could have contemplated. Community facilities of any sort, paid for by planters' tax dollars, were rare throughout Dixie, where the widely dispersed populace had few meeting grounds and those who ran its politics saw no harm at all in keeping the region a cultural wasteland. Even Virginia, where the Jefferson legacy might have encouraged public education, made no real provision for it until the middle of the nineteenth century; fewer than one out of ten Southern children between the ages of five and fifteen attended formally organized schools in the two decades before the war. As Congress sat down to write the Fourteenth Amendment, no Southern state could be said to have had a public school system worthy of the name.

* * * * * * * * * *

One March morning in 1933, a twenty-four-year-old resident of Durham, North Carolina, named Thomas Raymond Hocutt, who worked as an assistant headwaiter at the Washington Duke Hotel, filed an application for admission to the school of pharmacy at the beautiful University of North Carolina. The university was the pearl of the state's relatively progressive public education system, probably the most modern in the South, but never in its 144 years of operation had a Negro student been enrolled there.

Hocutt was advised that black residents of the state could pursue college studies at five institutions set aside for their exclusive use—two junior colleges for teacher training, one four-year teachers' college, one agricultural and technical college, and North Carolina College for Negroes. Hocutt had attended the last of these schools for a time, but it did not offer a course of study in pharmacy. Rejected by the all-white University of North Carolina, which ran the only public school of pharmacy in the state, Hocutt filed suit in Durham County Superior Court.

(He lost the case.)

Kluger, Simple Justice, pps. 632, 155.

* * *

All the way from New Orleans to Natchez, I was excited and anxious. I sat on the bus dreaming about Natchez [Junior] College. I had seen all of the colleges in New Orleans with their beautiful spacious campuses, large modern dormitories, and many new buildings. The only thing I knew about Natchez was that it was a Baptist school. That didn't impress me one bit. I just hoped it was a rich Baptist school and that it would be modern like the schools in New Orleans.

* * *

I got so wrapped up in trying to fix the suitcase before getting to the college that I didn't realize we were there until the cabdriver said, "O.K., miss, this is it."

"Is this Natchez College?" I asked as I sat there looking out of the cab at an old two-story red brick building, on which was engraved "Women's Auxiliary."

"You never been here before?" the driver asked as he opened the door for me.

* * *

"No, it's my first year. Is this all there is to the school?" As I stepped out of the cab, I could see only three little old brick buildings. "Sho' is!" he said, pointing to the red brick building, "This is where the women live."

* * *

At mid-semester when our averages were tallied, I had the highest average in the class. Soon after the averages were posted, I was called to President Buck's office. He asked me if I had any plans for going on to college next year. I didn't know what he had up his sleeve so I came on very cool with him in the beginning. But before our meeting was over I could tell that he really liked me in spite of all the disturbances I had caused on campus. So I broke down and admitted my worries about going on to college. Then he told me that I could probably get a full scholarship with my high grades. He said that a test would be given in a week or so for scholarships to a couple of the colleges in Mississippi and that he wanted me to try for them.

The following week, the registrar from Tougaloo College, the best senior college in the state for Negroes, came down. I took the test, and a week before school ended, I received notice that I had received a full-tuition scholarship.

* * *

I could barely wait until September, when I was to enroll in Tougaloo College as a junior. Meanwhile, I tried to find out as much as I could about the school. A girlfriend of mine at Natchez, after learning of my scholarship, told me that Tougaloo was not for people of my color. When I asked her what she meant, she merely said, "Baby, you're too black. You gotta be high yellow with a rich-ass daddy."

Moody, Coming of Age in Mississippi, (1968), pp. 194-195, 212-213.

The View from the Campus

A state system of public higher education is a very complex organization. Legislative policy and action give it life and breath, but as an academic institution it espouses a cloistered life, its faculties remote from the tangle of politics. Gubernatorial policy may assist or hinder public financial support, but the academic system prefers to believe it is not a government bureau. Private citizens, business and community leaders in positions of trust, help guide its administration but academia is not moved by corporate profit and loss; its motive is knowledge, its structure depends on collegial cooperation not hierarchical authority.

In short, a public system of higher education, like any academic structure, is unique. An administrator of this system must manage in two senses of the word: to direct and supervise the the institution(s), and to succeed or accomplish -- in other words, to survive.

An academic administrator of a public system must tread a careful path between governor, legislator, trustees, alumni, faculty, students, parents, and taxpayers. Each group may support or subvert his or her administrative goals. The role of the ideal administrator is to lead and control, mediate and arbitrate, campaign and compromise, expound and listen, advocate and placate.[31]

William Friday is chief administrator of the complex of academic institutions which constitute the University of North

Carolina. He is the senior public academic administrator in the country. He has both managed and survived.

The University of North Carolina has undergone many changes during his administration. The present Title VI regulatory process may prove to be the greatest challenge of his administrative career.

Again we start with a snapshot: This time of the Chapel Hill campus of the University of North Carolina, the flagship institution for the entire system.

Fall, 1977. To an observer from Harvard Square, the campus has a vaguely romantic atmosphere -- quiet, pastoral. Incredibly tall lush trees line the state highway leading into Chapel Hill's campus town, site of the leading institution of the multicampus University of North Carolina.

Chapel Hill, one of the oldest state universities, was the first to accept graduate students. Not all the sprawling campus is antique, but portions of it reflect UNC's eighteenth century background. The historic majesty of the oldest buildings is protected: a broad, very green campus yard, crossed by white paths lead past more lush trees to pillared brick buildings; a pastel memory of faded pink and yellow brick, these buildings are faded by antiquity, not pollution. Truly colonial. A student points to a round dome with pillars, a monument, the oldest on the campus.

New buildings grow around the old. An impressive medical complex, a tall new hospital center. A large, flat, student center housing a complex of activities including a busy campus store. Nearby a deep crater, construction under way for a women's athletic building. Even history must bow to Title IX and provide equal educational opportunities for women!

School is already in session. Students being students, lounging, talking, heading to class. To one accustomed to New York, Chicago and Boston campuses, there is an unusual atmosphere on this campus -- it seems quieter than the city campuses, the students less frenetic. Perhaps it is just the absence of noise -- busses and trolley lines don't parade in front of the main buildings.

The summer drought breaks; later there is a heavy downpour. It doesn't dampen the evening activities, though. It's "rush-week", and laughing groups of young women parade in and out of the sorority house across the street from the university inn. An open truck of singing students splashes down the street. Shades of the early 50's; a movie setting.

The student scene is predominantly white. A few black students are seen relaxing outside a campus canteen; two young men, one black, one white, say grace together before their meal in a campus restaurant. The other memories are white.

The undergraduate admissions office is located in the Monogram Club, on Country Club Road in Chapel Hill. Things change -- but slowly.

North Carolina bears an uncomfortable heritage. Founded in 1789, until 1931 the campus at Chapel Hill was the University of North Carolina. But it was not the sole public institution for higher education; other institutions were founded and maintained by the state, and the historic origins and background of those institutions are the basis for the problems state and federal government face in 1978. Some of the public institutions admitted men only (the Chapel Hill campus did not become coeducational until 1961); others, only women (the North Carolina College for Women at Greensboro); and by law (de jure) some admitted only white or only black students. There even was a public college founded to serve American Indian students (Pembroke).

The second oldest state institution (1877) has a tradition very different from Chapel Hill. Fayetteville State University (its present name) was founded as a training school for black teachers. By the time the Plessy decision constitutionalized segregation, three other public black institutions were started, one of them a black land-grant college. A former black, private school became a public college in the 1920's (now called North Carolina Central), bringing the total number of black schools to five. Although two of these colleges had broader charters (a black law school was started at Central in 1940), the primary mission of these schools was to meet the state's need for black teachers for its separate, black, public elementary school system. As a recent university report states: "The most distinctive characteristic of the historically black institutions is that they were established to serve a segregated black society."[32]

Each public institution, black and white, had its own board of trustees, and each developed and grew independently of the other institutions. For the most part this situation continued throughout the period of de jure segregation. In 1931, the women's college and the white land-grant university (now called North Carolina State University) were merged with the Chapel Hill campus to form a unified multicampus state university system collectively called the University of North Carolina (UNC).

At the time of the Brown decision, then, as a system UNC was coeducational and exclusively white. The state supported 15 senior institutions, ten white and five black, and the majority of these were organizationally and financially separate and independent.

Many legal and structural changes have occurred in North Carolina since Brown. A Board of Higher Education was established in 1955 to aid in planning and coordinating the development of the entire state system of senior institutions. In 1957, the state legislature eliminated race-related limitations on the academic missions of the public institutions, and the three black teaching colleges were authorized to train teachers for the secondary as well as elementary school system. In the course of the next dozen years, the five traditionally black institutions were first designated state colleges and then state universities. Each change was accompanied by an expansion of the academic mission of these schools. By 1972, North Carolina had amended its constitution, employment statutes and educational operating codes to reflect new state equal protection and nondiscrimination policies.

The university continued to consolidate. By 1969 three more public institutions (all traditionally white) were merged into a consolidated university system, making more than half of the white institutions part of a federated whole. The major reorganization of the state system occurred in 1972. Notwithstanding the coordinating efforts of the Board of Higher Education, when push came to shove each institution was dependent on the state legislature for financial support. A single budget request was made for the consolidated university, but each of the other ten senior institutions (the N.C. School for the Arts was founded in 1963) made its own request.[33] Many state legislators -- alumni of the various public institutions -- sat on the boards of trustees of these universities, and the policy of financial individualism ("each tub on its own bottom") led to institutional, alumni and legislative maneuvering at the capital. Political log-rolling gave rise to unnecessary, duplicative and irrational program funding. Furthermore, the black colleges, not as well represented in the legislative parlors, lacked adequate financial support.

Because of this ruinous politicized competition for funds, the legislature determined to reorganize the state's disorganized public system. A superstructure was added to the decentralized senior system of higher education. In 1972, all sixteen institutions, including the ten historically white* and five historically black schools, were merged into one unified University of North Carolina

*One school, the North Carolina School for the Arts, was founded after the Brown decision and therefore is technically not one of the "historic" white institutions although OCR includes it in the white category.

with a Board of Governors (elected by the state legislature) and chief administrative officer, the president of the university. Each constituent institution member retained its individual identity: name, board of trustees, chancellor and administrative and academic structure.

The legislation repealed the prior academic missions of most of the constituent institutions, delegating to the Board of Governors the power to determine academic programs for the system. In addition to this senior system, North Carolina has a separate statewide system of community colleges directed by the State Board of Education.

The primary purpose of the reorganization was to promote unified and comprehensive planning and development for all the senior public institutions. The central administration now presents one comprehensive budget request to the state legislature for the entire system. In a further effort to remove public education from public politics the reorganization statute barred persons (and relatives) with state-related jobs (legislators, officials, employees) from membership on the new Board of Governors.[34] This effort has not been entirely successful. Unlike the public colleges and universities, private academic institutions are not barred from having persons with state occupations on their boards. As "publics" depoliticized, "privates" became increasingly involved in state politics through growing legislative and boardroom connections.

North Carolina provides student financial assistance to eligible residents attending private institutions within the state.

Since the reorganization of the public system, the amount of this per capita assistance has increased and has intensified the competition for students between the public and private institutions. This public/private tension has important budgetary and antidiscrimination implications. Budget support for the public system depends on enrollment figures. Further, one goal of the Office for Civil Rights in the present Title VI regulatory process is increased black enrollment in the public higher education system of the state of North Carolina. Thus there is both internal (university) and external (federal) pressure on the public system for increased enrollment in the coming years. Yet at the same time, the state has increased student choice by helping them pay the cost of private education.

In North Carolina, ten years after the Brown decision the traditionally white institutions (TWI) in the public system were still 99 percent white and the traditionally black institutions (TBI) were 99.9 percent black.[35] By 1970, when the Adams suit started, the white institutions were 98.1 percent white and the black institutions were 98 percent black.[36] The legal barriers to entry into any part of the senior system had fallen, but other barriers remained.

The black colleges entered the seventies with a bad history and a bad reputation. A state report issued in 1967 underscored the weaknesses of these schools. Handicapped by their prior mission "to serve a segregated society,"[37] they suffered from inadequate academic and admission standards as well as inadequate faculties, facilities, and financing.[38] Furthermore a study showed

that even in their historic role as teacher's colleges they were failing their students. Graduates of the black institutions scored lower on the National Teachers Exam than graduates of any and all other colleges in the state, public and private.[39] The black nursing school programs were equally troubled. To cure some of these problems, the Board of Higher Education presented a supplementary budget request to the legislature of $2,891,110 for the years 1967-69 (which was over and above the $1,346,686 recommended by the Governor and the legislative committee), to provide personnel and programs to raise the level of the student body of these schools, and to improve faculty, salaries, facilities and financial aid.[40]

About the same time, the legislature appropriated over $5,800,000 in special funds, of which about half was earmarked for strengthening "developing institutions" i.e., (the black institutions). The rest of the money went to "strengthen institutional research capabilities" of the seven traditionally white institutions that North Carolina views as counterparts to the black schools.[41] North Carolina classifies its sixteen institutions into five categories: Major research universities (awarding 50 or more doctoral degrees and receiving over $10 million in federal government science support); other doctoral universities (institutions which awarded doctoral degrees in the most recent fiscal year); comprehensive universities (awarding master's and first professional degrees); general baccalaureate universities (awarding bachelor's degrees only) and Specialized Institutions (the School of the Arts).

There are no traditionally black institutions in the first two categories: two are in the comprehensive class, and three are general baccalaureate institutions.

More than inadequate educational and legislative support plagues these traditionally black institutions. The 1967 report showed that the average combined SAT scores for entering freshmen at the TWI's in 1966 ranged from 650 to 745 (the minimum score on the combined SAT is 400, the maximum score is 1600). That represented an improvement over the previous four-year period of 60-150 percent in average entering SAT score. The average combined SAT score for freshmen entering the TWI's in the same year was 823-1156.[42] The Board of Higher Education recommended that the TBI's raise their admissions standards from the 400-600 minimum then prevailing throughout the traditionally black system, to 800 for comprehensive universities and 750 for general baccalaureate colleges. The board realized this would create a short-term enrollment problem for these institutions, but felt higher admission standards were necessary to improve these schools.

Similar figures for 1975 show the average combined SAT scores for TBI's ranged from 573-720 (the two comprehensive institutions were highest, with 720 and 699 respectively). The range of average scores for white freshmen at the TWI's for the same year was 718-946.[43]

Using high school class rank as an alternative indicator of academic qualification, 33-40 percent of entering freshmen in the comprehensive black universities were in the top two-fifths of their high school class, compared with 48-77 percent for the

counterpart white institutions. In the baccalaureate category, 32-40 percent of entering freshmen at TBI's were in the top two-fifths of their high school class; comparable figures for TWI's show a range from 48-59 percent.[44]

One other factor is important: the human factor. Higher education, even public higher education, is both voluntary and costly. No external compulsion, only internal desire, brings a student to college. Many elements affect the exercise of discretion and choice in postsecondary education. Some choices are made before they are even perceived as choices. Junior high school students elect (or are placed) in courses that do not open academic doors. Other students drop out of school. Not all dropouts are culturally or financially disadvantaged, but many are, and for such students there are many distractions in the twelve-year march to college. In the nation, only 45 percent of the students who graduate from high school go on to some form of postsecondary education.

There are many links between compulsory public education (elementary and secondary schools) and higher education, not the least of which is the quality of professional education delivered by the senior system. Therefore, the poor performance record of the black college graduates from North Carolina on the teacher's exam is particularly poignant in view of the minimum degree of racial integration within the state's public school system at that time (1967). The Charlotte-Mecklenburg (N.C.) decision[45] (which said busing was a permissible remedy to eliminate the effects of past segregation) was decided by the Supreme Court in 1971. Real integration efforts in the public schools of the state only

came after the case. Until young black students were exposed to better prepared teachers in the public schools, a heritage of the segregated system -- weak scholastic preparation -- continued to confound antidiscrimination policy.

Although race is a significant factor, there are others that inhibit the breakdown of the traditional color composition of North Carolina's system of public higher education. In 1970, ETS sponsored an interesting study of 164 black freshmen attending traditionally white institutions (public and private) in North Carolina.[46] Listed high among the black students' reasons for choosing white colleges were availability of financial aid, program availability, future job opportunity, better education and proximity of campus to home. This last reason is significant in view of the students' reactions to their first-year experiences. Their predominant reaction was a feeling of isolation, which heightened black consciousness and emphasized the lack of social opportunity. The cumulative effect of this was a perception of "racial prejudice directed toward themselves." Their reaction was pejorative, that is, they thought, "I have to be just like the whites in order to survive."[47] Thus, socioeconomic status combines with race to make entrance into white institutions a difficult experience, even for motivated blacks.

Notably absent from the expressed reasons for their college choice were those usually given by white students, such as a parent or friend who is an alumnus of a school. Without these traditional influences on college choice, the role of the guidance counselor in the public schools is crucial. Although sketchy, the ETS reports

appear to indicate that such counselling had a minimal and possibly negative effect. Our limited research this fall indicates that an inadequate link between counselling and college does exist: One high school counselor did report going into the junior high to advise 9th graders on their course selection for 10th grade (by which time the students must be on an "academic track" if they want to go beyond high school). But this is not usual. Counselors do not "push" academic courses; they leave it to the student to make a decision. This "nondirective" ethic also appears when counselling 12th grade students for college. Counselors react to student choice rather than promote alternative choices.

Race, an intangible element of choice, is a very complicated factor in the world of elective education. Two reports illustrate the problem and deepen the dilemma. For North Carolina, the 1967 and 1976 reports on the status of the black schools (the later report was made at the request of OCR) were useful to generate increased financial and political support. An unintended effect of documenting the plight of black schools, however, is to stigmatize them. For white students, traditionally black schools are seen as institutions for students with little other choice.

There is more to achievement of educational opportunity than removing legal barriers to integration. American ideals embrace concepts of individual freedom as well as equality; both concepts, freedom of association and equality of men, are important constitutional principles. Freedom of choice -- choosing a college, for instance -- is more complex than the constitutional route from Plessy to Brown makes it appear.

The net result of these opposing rights in achieving educational equality (unitary systems of education) is to reach beyond the neutral premises of the nondiscrimination principle toward affirmative antidiscrimination. The federal regulator's answer to the dilemma of desegregation is affirmative action, affirmative integration.

Sheila Tobias's recent paper on Wesleyan's experience with changing academic hiring patterns documents a success story: the university had six women and two blacks in 1967; ten years later there were eighty-eight women and eighteen minority persons in its professional ranks. There were two keys to success.

One was the development of a "critical mass" of women and minorities.[48] Once developed, this group affects choice and decision and, like a magnet, attracts future representation. Lacking such a critical mass, for instance, the black freshmen in North Carolina's TWI's were isolated and angry.

The second key was, the change was entirely voluntary. Wesleyan had no federal contracts, and therefore was not subject to the affirmative action requirements of Executive Order 11246. Wesleyan "achieved what it did by reason of support from the top."[49] President and board led and continuously supported the social change which occurred. Wesleyan is one rather small liberal arts institution with no history of explicit segregation, located in a prosperous community in the northeast. Perhaps the experience at Wesleyan cannot or should not be translated to the more complex and varied problems of sixteen institutions spread across the state of North Carolina. More important is the question of whether successful affirmative

action techniques voluntarily selected by the administrative leaders at one institution can be imposed by federal regulatory process upon the administration of a very different institution.

A case where federal "affirmative action" regulatory process was successfully imposed, and upheld by the Supreme Court, is Lau v. Nichols.[50] Lau was an action brought against the City of San Francisco on behalf of a group of 1800 non-English speaking Chinese school children. The plaintiffs alleged (and the court found) that the treatment of such Chinese children was discriminatory because they did not receive assistance with English language, although it was a necessity for a certificate of graduation. The Supreme Court sustained a Title VI affirmative action regulation issued by HEW on the basis that requiring "extra" language training efforts was "reasonably related to the purpose of the enabling legislation" that is -- nondiscrimination. The regulation and the Court's decision in Lau related to compulsory fulltime elementary and secondary public school education, where English proficiency was a legal requirement for graduation from high school. The regulations sustained in Lau pertain to a vastly different situation than is presented in the public systems of higher education in the states affected by the Adams regulatory process. The dilemma of regulation of higher education in this instance is: can the federal government require affirmative action in a world of voluntary choice -- such as academia? Does Title VI antidiscrimination policy protect affirmative action or condemn it? Is the department acting within the authority of Title VI?

Thus, our review of the regulatory process has moved from the principles of Brown to the problems of Bakke.* One major distinction must be made, however: North Carolina, unlike California, is a state that was segregated by law.

The principles of Brown apply to higher education.[51] The presumption of the agency and the plaintiffs is that the "affirmative duty" to convert former "dual systems" to unitary systems (Green) is applicable to academic institutions. The statutory nondiscrimination remedy -- termination of federal funds -- is the appropriate remedy whenever a violation of the antidiscrimination standard is shown. The standard for the content of a "unitary system" has never been determined for a decentralized, multicampus, voluntary system such as the University of North Carolina. The appropriate remedial measures to achieve a "unitary" system within that context are unclear. Now, in the Adams case, all institutions -- academia, court and regulatory agency -- struggle with this issue and seek its proper solution.

* The Bakke case involves a "reverse discrimination" question. The University of California, in order to promote greater medical school opportunity for minorities, has a special admissions program for such persons. Bakke, a white student denied admission to the medical school at Davis challenges this policy as contrary to the 14th Amendment and Title VI of the Civil Rights Act.

The stage is set, bounded on one side by the Brown decision and on the other by the hard facts and tough choices that mark a public system of higher education. Centerstage is Title VI and federal antidiscrimination policy.

The time is 1969: a coalition of black citizens, supported by the NAACP Legal Defense Fund disagrees with a federal agency, the Office for Civil Rights, over the policies for enforcing Title VI.

> ...[S]et up to take advantage of new laws granting tax-exempt status to non-profit organizations that did not have a lobbying function as their principal purpose, the offshoot was formally called the NAACP Legal Defense and Educational Fund, Inc. That was, everyone agreed, rather a mouthful. For short, it was called the Legal Defense Fund. Later, it became "the Inc. Fund." In time, it would be just "the Fund".
>
> * * *
>
> ...In the first half-dozen years after Brown, while the federal government lagged badly in its enforcement efforts, the Legal Defense Fund,Inc. had never faltered in pressing the desegregation drive in countless courtrooms throughout the South. In the Kennedy years and after, alumni of the Fund's Brown campaign moved to the federal benches -- Robert Carter, Constance Motley, and Jack Weinstein were United States District Court judges in New York; Spottswood Robinson was on the U. S. Court of Appeals for the District of Columbia; William Hastie, though retired, still sat occasionally on the Third Circuit Court of Appeals, and Thurgood Marshall, of course, sat on the nation's highest court. A new crop of lawyers at the Fund carried on with more energy and success than ever under Jack Greenberg, who in 1974 marked his twenty-fifth year in the organization. Dozens of Fund lawyers and affiliated attorneys were pushing several hundred cases across the nation to widen black rights.

Kluger, Simple Justice, pps. 221, 775-776 (1975)

THE POLITICS OF REGULATION: THE FIRST PHASE: 1964 - 1977

The Agency: HEW and OCR 1964 - 1977

A strong civil rights statute had been enacted: Federal policy was declared and now policy had to be transformed into action. Every federal granting agency was to issue nondiscrimination regulations and begin enforcement of Title VI. For HEW, the primary funding agency for education, the job was complicated and complex.

Since 1954, the NAACP Legal Defense and Education Fund (LDF) had encouraged and financially supported the parents of black children in their attempts to dismantle the racial structure of southern school systems: now the burden and the cost of achieving change in the schools to meet the standard of Brown and Title VI lay with HEW. Evidence of continuing discrimination required collecting raw data at the state and community level before any Title VI noncompliance proceeding could be commenced. The vast community support network which LDF had built up over the long years of challenging the Plessy rule would assist HEW in its new task.

Starting in 1965, LDF volunteered its community networks and undertook to monitor Title VI compliance. The group monitored the state situation at all levels of education, including higher education, but the main emphasis was on the public school systems. Furthermore, they brought pressure on the Commissioner of Education to issue civil rights guidelines for Title VI.

This relationship between LDF and HEW is unusual. A common view of the history of regulated industries is that the regulator

becomes co-opted by the group being regulated. But HEW and LDF do not have the relationship of regulator and regulated subject. Rather LDF is a very active interest group, concerned for the civil rights of black citizens, knowledgeable about the public school systems and the political situation in the south. It was invaluable to HEW in this early period of Title VI enforcement. To other persons, particularly in higher education, this close relationship between the LDF and the regulating agency has been ambiguous and confusing. Who is doing the regulating -- the agency or LDF? Based on the past history of Title VI enforcement, some persons in the states affected believe a realistic answer to that question is the LDF. Certainly it has been a major participant in the regulatory process.

The department was slow in organizing Title VI efforts. As one commentator has stated:

> As might be expected of any plan in its initial stages, Title VI caused confusion. For one thing, the beneficiaries of the federal educational assistance -- blacks -- were simultaneously the victims, however indirect, of the sanctions of Title VI. If the schools went without federal assistance, then so did the blacks.[52]

Until 1968 there was no separate office for civil rights within HEW. In 1968, Ruby Martin, the first director of the newly created Office for Civil Rights, began evaluating the data from LDF and other sources. By 1969, analysis of the collected data demonstrated that public elementary and secondary systems were racially imbalanced, and so, too, were some state systems of higher education.

Based on this information, OCR determined that certain states were operating racially segregated systems of higher education, and in 1969-1970 Leon Panetta, the new director of OCR, sent letters

to ten states in which such segregation determinations had been made, requesting each state to submit to HEW a desegregation plan within 120 days from the receipt of the letter. These notices of noncompliance were sent to the states of Louisiana, Mississippi, Oklahoma, North Carolina, Florida, Arkansas, Pennsylvania, Georgia, Maryland and Virginia. By December of 1970 only five states had replied to OCR's request: Arkansas, Pennsylvania, Georgia, Maryland and Virginia had submitted some version of a plan for desegregation of the state's public higher education system.

No further Title VI enforcement procedures were taken by the department, even in the case of those states which had not submitted a desegregation plan. Furthermore, no Title VI regulations governing higher education had yet been issued.

Even for HEW (with a reputation for disorganization) these proceedings -- from 1965 to 1970 seemed erratic. The LDF and other interested parties might well conclude that HEW-OCR had no interest in enforcing Title VI. But more than sheer stubbornness contributed to this administrative inaction. Like every other actor in this study, the problems confronting the agency are a mixture of hard fact, legal command and politics. And for HEW, politics is a major component of agency action.

HEW-OCR has two major problems: a high turnover rate among their top personnel, and divided and conflicting organizational responsibility for Title VI enforcement. Both factors have affected the quality of the regulatory process over the past years.

There have been a number of changes among those playing major roles in regulating the states' efforts since the start of the Adams

suit in 1970. Enforcement of the 1964 Civil Rights Act has been affected by the policies of four Presidents of the United States, eight Secretaries of the Department of HEW, six General Counsels to the Secretary, six Assistant General Counsels for Civil Rights, and six Directors of the Office for Civil Rights. (See Appendix B.) Obviously, the policies of all these persons in some way affected the enforcement of Title VI in educational matters both before and after the start of the Adams suit.

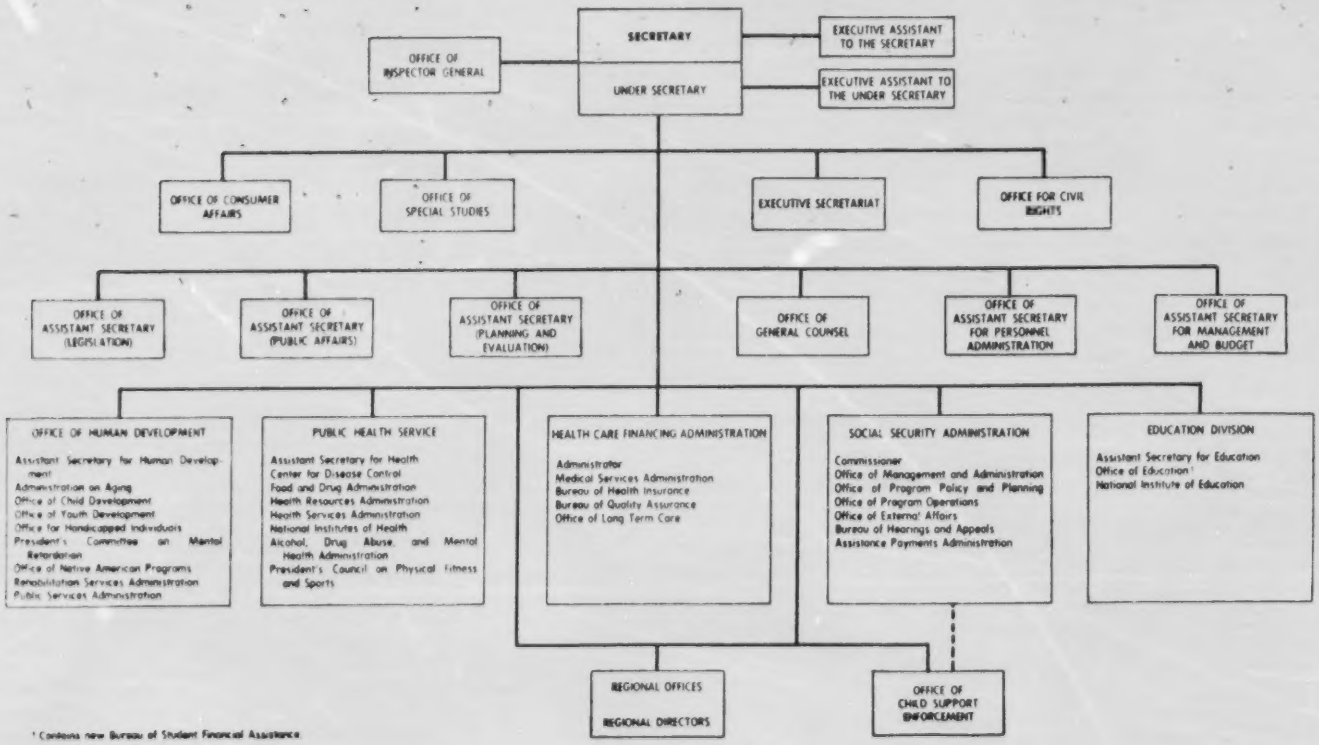
The turnover in HEW personnel is higher than usual in Washington bureaucracies.[53] Only one senior member of HEW-OCR now involved in this regulatory proceeding has been with the agency since the initial determinations were made to start Title VI proceedings. The turnover is caused by political change in Washington (which accelerated during the Nixon years). But turnover at the top is also heavy at lower levels of HEW-OCR. Young staff, mainly lawyers, have little patience with Washington bureaucracy.

Constant personnel change damages relations inside and outside the agency. A policy set or position taken by one person may be reversed by his or her replacement. Within the agency, the permanent staff -- civil servants -- become overly cautious; a "why bother" attitude frustrates internal change. For persons outside the agency -- regulated groups and interest groups alike -- a credibility gap develops, fostering distrust and cynicism. The stability of tenure in colleges and universities makes the instability of regulatory personnel appear particularly irritating. The contrast between President Friday's twenty-one year tenure at North Carolina

and Secretary Califano's one year at HEW captures the problem in a nutshell.[54] Further, each shift in agency administration represents a threat to the continuing validity of past agency positions and policies (especially when such policies are not formal regulations). Rapid shifts in position make the enforcement of the law appear lawless. Developing cynicism on the part of the regulated group breeds inaction, a waiting game. Like New England weather -- if you don't like a decision, wait a week, the new man in town may reverse it.

Another way to play the regulatory game is organizational politics. There is political tension inherent in the overlapping responsibility for Title VI enforcement. Check and counter-check permeates the administrative agency. The present structure of the department is shown below.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE


SECRETARY
UNDER SECRETARY
OFFICE OF INSPECTOR GENERAL
EXECUTIVE ASSISTANT TO THE SECRETARY
EXECUTIVE ASSISTANT TO THE UNDER SECRETARY
OFFICE OF CONSUMER AFFAIRS
OFFICE OF SPECIAL STUDIES
EXECUTIVE SECRETARIAT
OFFICE FOR CIVIL RIGHTS
OFFICE OF ASSISTANT SECRETARY (LEGISLATION)
OFFICE OF ASSISTANT SECRETARY (PUBLIC AFFAIRS)
OFFICE OF ASSISTANT SECRETARY (PLANNING AND EVALUATION)
OFFICE OF GENERAL COUNSEL
OFFICE OF ASSISTANT SECRETARY FOR PERSONNEL ADMINISTRATION
OFFICE OF ASSISTANT SECRETARY FOR MANAGEMENT AND BUDGET
OFFICE OF HUMAN DEVELOPMENT
Assistant Secretary for Human Development
Administration on Aging
Office of Child Development
Office of Youth Development
Office for Handicapped Individuals
President's Committee on Mental Retardation
Office of Native American Programs
Rehabilitation Services Administration
Public Services Administration
PUBLIC HEALTH SERVICE
Assistant Secretary for Health
Center for Disease Control
Food and Drug Administration
Health Resources Administration
Health Services Administration
National Institutes of Health
Alcohol, Drug Abuse, and Mental Health Administration
President's Council on Physical Fitness and Sports
HEALTH CARE FINANCING ADMINISTRATION
Administrator
Medical Services Administration
Bureau of Health Insurance
Bureau of Quality Assurance
Office of Long Term Care
SOCIAL SECURITY ADMINISTRATION
Commissioner
Office of Management and Administration
Office of Program Policy and Planning
Office of Program Operations
Office of External Affairs
Bureau of Hearings and Appeals
Assistance Payments Administration
EDUCATION DIVISION
Assistant Secretary for Education
Office of Education[1]
National Institute of Education
REGIONAL OFFICES
REGIONAL DIRECTORS
OFFICE OF CHILD SUPPORT ENFORCEMENT

[1] Contains new Bureau of Student Financial Assistance

U.S. Government Manual

Within HEW responsibility for enforcing Title VI is divided. OCR is responsible for collecting and analyzing data (required of federal fund recipients); undertaking "compliance reviews" (on-site inspections and data evaluation), and initiating voluntary compliance procedures (negotiations) when analysis shows noncompliance with the standards of Title VI. If voluntary procedures fail to correct the problem, OCR recommends that Title VI enforcement procedures be started.

The enforcement recommendation made by OCR is only the beginning of the process. HEW's Office of General Counsel (OGC) is responsible for the review and approval of such a recommendation. If the General Counsel supports OCR's recommendation, OCR sends out a "notice of noncompliance" letter to the party alleged to be discriminating, stating the problem and requesting a corrective response within a specified time. This was the procedure Leon Panetta followed in 1970 by sending the original "notice" letters to the ten states.

If the recipient does not respond as requested proceedings may be started for an administrative hearing. The General Counsel is responsible for such proceedings. The statute also requires that any final administrative decision recommending termination of federal funds be subject to congressional review.

Herein lies another twist: judicial review of Title VI administrative proceedings (such as now are pending against the states of Louisiana and Mississippi, two of the original Adams states) is the responsibility of the Civil Rights Division of the Department of Justice, an entirely different jurisdiction. HEW-OCR and Justice

do not always agree on Title VI civil rights policy, as the recent publicity about the government's amicus brief in the Bakke case demonstrates.[55]

For higher education, therefore, implementation and enforcement of Title VI's nondiscrimination mandate is jurisdictionally scattered among different departments and different agencies of the government. Furthermore, OCR does not participate in the creation or generation of policies involving the granting of federal funds. Authority for directing affirmative programmatic policies is even more divided within the various branches of HEW than is civil rights enforcement. Within HEW, OCR is an isolated enforcement arm: it may take away the federal dollars which others, such as Mary Berry, Assistant Secretary of Education, and Ernest Boyer, the Commissioner of Education grant.

This division of authority between Title VI enforcement and implementation and programmatic funding leads to struggles over bureaucratic "turf" and responsibilities. Fractionated authority helps explain the bureaucratic stalemate that occurred in 1970: no further action was taken by the department after the noncompliance letters were sent to the states. The common image of OCR as an agency populated by civil rights zealots was countered by HEW's sluggish enforcement of Title VI. Civil rights zeal and bureaucratic politics combined to create a stalemate.

Divided enforcement authority may lead to political games in the regulatory process. OCR found situations similar to those of the other ten states for the states of Texas and South Carolina, yet no notices of noncompliance were ever sent to them. Texas

and South Carolina were "lost" somewhere between OCR and OGC. Various reasons have been advanced for the omission of these two states from the list, but the reason most commonly expressed by some participants is politics: Senators Thurmond and Tower were important to Nixon's "southern strategy."

The political exercise of prosecutorial power is the very antithesis of legal procedure. For those caught in this regulatory process, agency politics leads to frustration and bitter feelings and tends to turn voluntary cooperation into adversarial polarization.

The Adams Suit: Phase I: 1970-1973

The exercise of agency discretion and the noncompliance letters sent to the ten states had very important consequences. By 1970 the Legal Defense Fund, monitoring the Title VI efforts of agency and states, was dismayed by the inaction and lack of effective enforcement of the Civil Rights Act. They took action. Before the Civil Rights Act they would have brought suit against each state; now they sued the agency.

In late 1970, Kenneth Adams and a coalition of representative black interest groups brought suit against the Department of Health, Education, and Welfare. The plaintiffs requested the court to order HEW to proceed to enforce the antidiscrimination provisions of Title VI and terminate the flow of federal funds to the primary, secondary and higher education systems of the ten states who had received notice of noncompliance letters from OCR in 1969 and 1970. Thereafter the "letter recipient" states (the Adams states), although not named as defendants in the suit, would be subject to court-ordered regulatory process.

Originally the plaintiffs' primary goal was to bring pressure on the state public school systems. However, they became increasingly aware of the importance of higher education as a link between school and occupational opportunity. They felt real social change would not come until the barriers to higher educational opportunity were eliminated. The focus of the original Adams case then shifted, and thereafter the plaintiffs' legal efforts concentrated on HEW's

efforts to desegregate the public higher education systems of the ten states.*

The court process moved slowly. HEW argued that its failure to take any further action was justified by the pending negotiations with the ten states and the great complexity of the problems of segregation in statewide higher education systems. It also argued that the "desegregation-at-once"[56] standard did not apply to public higher education.

In 1972, Judge Pratt of the federal district court in Washington, found that HEW had not commenced Title VI administrative enforcement action, as required by the statute, and that it was still advancing federal funds in substantial amounts for the benefit of academic institutions in the ten states. Although it recognized that voluntary compliance implies discretionary power to negotiate and that "negotiations take time," nevertheless the court concluded that such discretion is not unlimited and had been abused in this instance. As Judge Pratt stated:

> In summary, the discretion implicitly vested in defendants by statute exists solely for the purpose of achieving voluntary compliance with the requirements of Title VI. As the undisputed record demonstrates, defendants' efforts toward voluntary compliance have been unsuccessful in the case of many state[s] ... which continue to receive substantial federal funds

*The case had a broad aim to force HEW to proceed with its Title VI obligations in all types of educational systems. The issues with regard to elementary and secondary systems and state operated "special" schools -- such as training schools and schools for the mentally disabled or mentally ill -- have subsequently split off from the Adams v. Califano case. These issues continue to be litigated in different cases, however; see, Adams v. Mathews, 536 F. 2d 417 (C.A.D.C. 1976) and Brown v. Weinberger, 417 F. Supp. 1215 (D.D.D.C. 1977) for examples of the continuing situation with regard to levels below the higher education system.

> in violation of the statute. Defendants now have no discretion to negate the purpose and intent of the statute by a policy described in another context as one of 'benign neglect' but, on the contrary, have the duty, on a case-by-case basis, to employ the means set forth in 2000d-1 to achieve compliance.[57]

Thereupon the court ordered the plaintiffs (after consultation with the defendants) to submit their proposals concerning an appropriate order for the court to issue. This link between court order and plaintiff proposals often occurs in school desegregation cases. In part this arises from the plaintiffs envoking the equity powers of the court to issue an order for relief. If the court finds relief is appropriate (as they did in the Adams case), then the order must relate to the plaintiff's problem. School desegregation cases are so complex that often the plaintiff knows more than anyone else regarding the nature of the situation and its possible cure. Therefore, in such cases the courts have relied on the plaintiffs to suggest what remedy the court should order. This relieves the pressure on already overworked courts, but in this type of case -- ordering a regulatory agency to regulate -- it strengthens the feelings of the regulated group that the agency is merely a conduit for a particular interest group (in this case the NAACP-Legal Defense Fund). Therefore, to some, it appears that independent agency decisions and actions are not independent at all.

Four months later, Judge Pratt issued an injunction ordering HEW to commence enforcement proceedings against the ten states within 120 days.[58] HEW appealed the trial court's conclusions of law and its order, arguing that the exercise of prosecutorial discretion was not subject to judicial review. The appellate court rejected

that argument, stating that the "discretion exemption" to judicial review was limited to the rare instance of the statutes drawn so broadly "that in a given case there is no law to apply."[59]

Notwithstanding its rejection of HEW's view of the law, however, the appellate court modified the trial court's order concerning public higher education systems. The court noted that desegregation efforts for colleges and universities differed "widely" from elementary and secondary education, and that HEW lacked "experience" in dealing with such higher educational problems. Since HEW had not yet formulated guidelines for desegregating such statewide systems, the court felt HEW must be given more opportunity to "assess the significance of a variety of new factors as it moves into an unaccustomed area."[60] Therefore, the appellate court ordered each of the ten states to submit to HEW a state plan for higher education within 120 days. HEW was then given 180 days to review each plan and, where necessary, to negotiate with each state to arrive at an "acceptable plan." If at the end of such period a state plan was still considered unacceptable -- or if one was never filed -- HEW was to initiate compliance procedures in accordance with the statute.

The legal effect of the court's opinion was to modify Judge Pratt's original order by granting HEW an additional six months before mandating the formal Title VI enforcement proceedings. Eventually this negotiation time was further extended, by agreement of the parties, to June 1974.

The Courts and Higher Education

It took over three years for the first round of the Adams proceedings (trial and appeal) to grind through the courts. Thereafter, state and agency struggled with the process of developing and implementing state higher education desegregation plans.

HEW had varying success with this court-mandated process. Louisiana did not submit a state plan, and Mississippi's was rejected as unacceptable; both cases were referred to the Justice Department for commencement of enforcement proceedings. Plans for some states, including North Carolina, were approved by HEW in 1974. In 1975, the plaintiffs, again dissatisfied with state and agency action and inaction, went back into Judge Pratt's court and asked for further judicial relief. The Judicial response to this new request was announced in March of 1977 when the court ordered HEW to produce guidelines to aid in developing new and adequate state plans for public systems of higher education.

In response to this court order, HEW developed the "Adams Criteria", which they submitted to the court on July 5, 1977. Thereafter, throughout the summer and fall of 1977, OCR and the six states still affected by the Adams suit worked to develop new state plans.

The details of the regulatory process during 1974-1977 will follow. First, however, an overview of the relationship between court and higher education is in order.

The Brown case affects higher education, but the courts have been reluctant to interfere with actions taken by public academic

administrators (boards of trustees, presidents of state systems, chancellors of state institutions) concerning the methods to achieve the goal of integration. They have deferred to academic judgments on such matters. For instance, in one case involving the higher education system of Alabama, the court said:

> Plaintiffs fail to take account of some significant differences between the elementary and secondary public schools and institutions of higher education and of some related differences concerning the role the courts should play in dismantling the dual systems.
>
> ***
>
> We conclude that in reviewing such a decision (a proposed school construction project) to determine whether it maximized desegregation we would necessarily be involved, consciously or by default, in a wide range of educational policy decisions in which courts should not become involved.[61]

The reluctance to use judicial power in such cases is based on three factors. One is a fear that where state education officials have exercised good faith in their actions, judicial intervention would be "an almost presumptuous substitution of the court's judgment for that of the state officials involved..."[62]

Second is a fear of the court that it lacks effective remedial power. "Higher education is neither free nor compulsory."[63] The element of voluntary choice, an essential part of the academic ethic, undermines the typical remedies courts have fashioned for desegregation of lower level public school systems -- systems that are both free (cost) and compulsory (attendance). Judicial power to create remedies for the public schools, and assignment of teachers or students to achieve racial balance, are judged inappropriate for educational systems premised on choice not compulsion.

Lastly, judicial reluctance appears to be based on a "balancing of interest" concept that weighs affirmative judicial involvement

against opposing public policies that prefer the final decisions to remain in another forum. But judicial reluctance may be turning to judicial activism -- even for academia. Whereas in 1968-70 a balancing of the interests would tip in favor of judicial nonintervention, now the scales tip the other way.

The federal court, in a case involving the desegregation of the higher education system of Tennessee, illustrates this movement from nonintervention to activism. In 1968 the court ordered the state to submit a plan to dismantle the dual system (black/white) of public higher education but declined to enjoin a proposed construction project (incidentally, financed by federal money). The state's predominantly white institution was therefore permitted to build a branch campus next to an existing, but traditionally black, institution.[64]

In 1977, however, the Tennessee court balanced the equities in favor of judicial intervention in state academic affairs.[65] Between 1968 and 1977, the state had failed to develop an adequate plan for elminating the dual academic system as ordered by the court in 1968. The administration of the institutions involved could not act in cooperation to find a voluntary solution for breaking the historic racial barriers. After nine years of frustration, the court ordered the predominantly white institution to merge into and be placed under the authority of the competing, predominantly black, institution. Because, among other things, one system operated on a quarterly calendar and the other on a trimester basis, voluntary academic cooperation failed. It was then necessary for judicial power to be used to achieve what academics could not -- a hard decision.

As a consequence of this shift in judicial attitudes, more courts are reviewing academic procedures, ranging from tenure to admissions, and ordering that traditional methods be changed. As one court said in reviewing (and affirming) an affirmative action admissions policy:

> In so concluding we do not intend to limit the discretion normally reposed in college administrators to determine who shall be admitted to their institution. Courts should continue to refrain from interfering with such decision-making processes . . . Nonetheless, where benign or malign discrimination is practiced outside the bounds of constitutional limits judicial vigilance and intervention, however undesirable, are required.[66]

The Adams case illustrates the tension between judicial hesitancy and judicial activism. As voluntary and regulatory efforts fail, the court steps into the breach and becomes more directive. The 1973 appellate court decision acknowledged the need to consider the problems of higher education in a special manner. At the same time, the court was not reluctant to change academic traditions. The court said the problem of racial imbalance must be "dealt with on a state-wide rather than a school-by-school basis." Adams is the first case to require a state-wide approach to the remedy in higher education.

The court of appeals approach, to consider the problems on a state-wide, system-wide basis, is a rational approach if one desires to set a legal standard with the greatest economy of means. However, the system-wide approach has many implications for academic governance, which traditionally has allowed great autonomy and independence to the individual constituent institutions within any given system.

In North Carolina, with its unitary university system, the machinery for state-wide planning for the senior system is already in place. The situation is different for other states affected by the Adams case. And even in North Carolina, centralized administration does not equal centralized control over every aspect or even over major aspects of academic governance. This fact is often overlooked by agency and interest groups. A multicampus university is still an academic institution, not a bureaucratic hierarchy. Like other academic institutions, within North Carolina's unified system traditional autonomy and decentralized control throughout the sixteen constituent institutions is still honored.[67]

Thus, judicial activism challenges academic institutional governance: traditional academic autonomy and decentralized control are pitted against a more rational (in the court's view) centralized control. Furthermore, there is a ripple effect to this approach. Increasing administrative centralization is well demonstrated by the argument of the plaintiffs in their return to the court in 1975:

> In the face of the emphasis by the Court of Appeals that the 'problems must be dealt with on a state-wide rather than a school-by-school basis,' the plans leave vital elements within the judgment and control of the individual school's authorities. The plans consistently renounce state-wide changes, state responsibility and commitments by state officers on the purported ground that local statutory schemes leave such matters as student admission, teacher hiring, scholarship aid and the educational program in the hands of the individual institutions and their boards.[68]

Not only do the Adams plaintiffs appear to undermine, at least implicitly, traditional governance mechanisms; so, too, do Congress, the courts and the executive agencies.

The basic question in government regulation and court supervision of higher education is: who is to make fundamental decisions for the institutions? Who is to make decisions which touch the academic standards and curricula? This is the real issue posed by the increasing involvement of the courts and legislatures and administrative agencies into the affairs of the campus.

The implications of increased regulatory and judicial activism are broad, and will affect many more academic institutions than those named in the Adams case. The general rules and regulatory authority established in this action will apply to any academic institution receiving federal funds in which a pattern of discrimination is found.[69]

Judicial activity is provoked by indecision and inaction. If academics cannot voluntarily act to achieve social goals, the courts, Congress and regulatory agencies will make the hard decisions for them. And the walls separating academia from government will be dismantled piece by piece.

The Rough Shoals of Regulating

The plaintiffs got their court order. At the discretion of the appellate court, the Adams states were to produce state-wide plans for higher education and submit them to HEW-OCR. The agency was then to review, and negotiate where necessary, in order to produce acceptable state plans. The burden of proof was on the states and the agency to show they could do the job without court interference. They both failed the test.

Although the process of regulating involved agency interactions with first ten, then eight and now (1977) six states,* the review of the action, 1974-1977, will now be focused primarily on HEW-OCR and North Carolina.

After the 1973 court order, OCR requested further information concerning North Carolina's education system. Later, OCR informed the state that it continued to violate Title VI standards, and again requested a desegregation plan. In early June, the Board of Governors filed a plan with OCR. This was the first plan submitted by UNC since the receipt of the original noncompliance letter in 1969 or 1970. This plan was unacceptable to the agency; it was not a "comprehensive" plan for desegregation of postsecondary institutions. Between late 1973 and early 1974, Peter Holmes, Director of OCR (1973-1975), sent the state detailed comments concerning the plan, with proposals for further changes, both substantive and procedural.

As a result of the court's state-wide approach, the problem was escalated to the governor's office. Holmes wrote the governor requesting that the Board of Governors and the State Board of Education (responsible for the Community College System) develop a "coordinated. . . comprehensive. . . and workable plan" for the state higher educational system. While reorganization of the university system had centralized authority for senior institutions, responsibility for all postsecondary education in North Carolina remained divided between two major boards

*The problems with Louisiana and Mississippi were turned over to the Civil Rights Division of the Justice Department for Title VI enforcement proceedings in 1974. The state of Maryland commenced suit against HEW (protesting the agency determinations concerning their state plans) in 1975 and HEW was negotiating a settlement with Pennsylvania.

and the presidents of the two systems. It required the power of the state's highest official, the governor, to get the presidents and boards of the two component parts of the state postsecondary systems to coordinate their efforts.

Escalation of the problem to the governor's level achieved coordination; it also increased the political dimensions of the system's response. Whatever position North Carolina took had to be compatible with gubernatorial as well as legislative politics. Friday and his new Board of Governors had a delicate balancing act to perform: on one side, state politics, on the other, Washington.

The political scene at the state level was and remains complex. The Board of Governors plays an interesting role in the North Carolina system. The old Board of Higher Education (pre-1972) was a "coordinating" board -- it could cajole, not command. The new Board of Governors is a governing board; on paper it has the potential power to command.[70] In operation, however, it does not exercise that power, having delegated much of the operating authority to the president or the constituent institutions. As is usual with managing boards whose members donate their time, the Board of Governors accepts or rejects the programs and policies of the academic administration; that is, it ratifies the actions of the central administration.

UNC is a university. In operation, the system is decentralized. Each constituent institution has its own administrative structure -- board of trustees, chancellor, deans, faculties and other academic power groups. Each institution sets its own standards in regard to students, faculty and academic quality. At the campus level, it is hard to perceive the system as an organic whole.

Throughout this period, 1974-1977, the Board of Governors itself was new, still learning its role within the reorganized structure. The board has a rotating membership of thirty-two members. In 1972, when it was first instituted, the Board of Governors consisted of two representatives from the boards of trustees of each constituent institution -- a conservative force in a new situation. Since 1973, as the terms of the original members expire the legislature elects new members to serve eight-year terms. A class of eight is elected every two years.

One last point: one of the goals of reorganizing the governance mechanism was to depoliticize the financing of the university. Now, however, the new board is part of the political process; its members are elected by the legislature. Political campaigns are waged for a seat on the board. The result of the reorganization has been to depoliticize the budget-making process of the constituent institutions while increasing the political links between board and state legislature. The role of the legislature presumes political compatibility between the policies of the university system and the desires of the legislature.

The combined efforts of the senior system and the community system, through their respective administrations, produced a revised state plan,* which was submitted to the governor. He approved it and filed it with OCR in May, 1974. In June 1974, Peter Holmes, Director of OCR (1973-1975), accepted eight state plans, including North Carolina's, as Title VI desegregation plans.

*This plan is officially entitled The Revised North Carolina State Plan for the Further Elimination of Racial Duality in the Public Post-Secondary Education Systems; this document will be referred to as "the State Plan."

Among other things the plans committed the states to give OCR semi-annual progress reports. OCR was to monitor and review these reports and assess Title VI compliance progress. Copies of such reports were to be made available to the plaintiffs in the Adams case.

In North Carolina, pursuant to the promises made in the State Plan, the Board of Governors of UNC requested additional funds to finance some of the Plan proposals. Such funds are now built into the university's budgeting process. Most of the additional resources were to be applied to the black institutions to bring them on a par with traditional white institutions of similar types. For instance, faculty salary bases for each academic rank at every institution were made uniform throughout the system, and physical plant and library and laboratory resources at the traditional black colleges were upgraded. On a per student basis, the traditionally black institutions received proportionately more of the total new, or reallocated, higher educational financial resources in the post-plan years.[71]

It is impossible to detail all the activities that affected the educational system in these years, but two, one positive and one negative, have particular bearing on later events. One was the strong academic improvement of the traditionally black law school at North Carolina Central University. The other was the board's decision to start a new veterinary school at the traditionally white, land-grant university, North Carolina State University.

The American Bar Association precipitated the efforts at North Carolina Central law school, the graduates of which had a poor record on the state bar exam. The ABA placed the school on marginal status,

and threatened to withdraw its accreditation altogether. Without ABA approval, graduates of the law school were barred (by North Carolina law) from taking the state bar exam.

In response to this pressure from the accrediting organization, and alumni of the school, the Board of Governors and the President of the university committed energy to upgrading the law school. By monitoring admissions policies, improving faculty quality and increasing library resources, the student performance was improved and the school and full accreditation was regained.

The pressure that caused real change was not the State Plan but the interaction between a professional accrediting organization and the legal requirements of the state for admission to the profession. But a result of improving the law school, when at the same time the number of applicants to law schools is increasing, has been to promote racial balance in the school. Student enrollment had been almost 100 percent black prior to these events. Now (1977) 60 percent of the students are black and 40 percent white. In fact, if enrollments at the law school were made on a racially neutral basis (which they are not) there is evidence that the proportion of whites in the school would be even higher and perhaps be a majority of the student body. Furthermore the proportion of Central's graduates passing the North Carolina bar exam increased from 35 percent in 1976 to 83 percent in 1977.[72]

The outcome of the decisions concerning the law school at NCCU had a positive effect on racial balance. The effect on racial balance of the choice of a location for the veterinary school is in doubt. (To date, the legislature has only appropriated planning funds and pressure is being exerted to change the decision.) However to the plaintiffs the effect was negative, and its effect on Washington was to create confusion.

The decision concerning the location of a School of Veterinary Medicine (SVM) is very complex, and has had political and regulatory repercussions. The discussion about the program goes back into the sixties. The state does not have a veterinary school. Under pressure from a group of professionals, the governor and then the legislature requested funds for planning studies with the aim of establishing such a school. By 1972 a department of veterinary sciences had been established at the traditionally white land-grant college, North Carolina State (NCSU).

Under the State Plan, the black land-grant institution North Carolina Agricultural and Technical College (A&T) could, if the Board wished, grant doctoral degrees. And in fall 1974, after four or five years of discussing the need for a veterinary school, the president of A&T supported the concept and requested it for his school. Friday, faced with a conflict between the two land-grant colleges, asked for a feasibility study. HEW, through Bill Thomas, Regional Director of HEW's Atlanta Office, requested that the impact of race be included in the study.[73] However, the consultant was not asked to include racial impact in the study, nor did he include such findings in his discussion. His findings favored placement at NCSU.[74]

When the board met in November of 1974 to vote on the issue, Thomas (who learned of the meeting the day before) appeared and voiced strong objections to choosing NCSU without taking into account the racial impact of the choice. The board voted to establish the School of Veterinary Medicine but deferred a decision on location until such impact could be studied. One month later, the board voted to locate the school at NCSU. They felt that factors of "educational soundness" were weighted in favor of NCSU, and that the racial impact of such placement would be neutral. At the same time they voted to undertake a feasibility study for locating a "related activity" at A&T.

Everybody was upset; administration and alumni groups at A&T; HEW in Atlanta and Washington; the plaintiffs in the original Adams suit. The A&T interests started a noisy campaign; even cornering Terry Sanford, President of Duke University and former governor, at the 1976 Democratic convention on the issues. They brought suit in the federal district court in North Carolina to enjoin any further development of the school.[75] The court declined to issue a preliminary injunction, but left open the issue of racially separate educational policies for a full hearing on the merits of the claim. This case is still in process.

HEW-OCR disapproved both the decision-making process and the decision, on the basis that it was inconsistent with the intent of and the actual commitments made in the state plan in 1974. In March 1975, Bill Thomas requested that the board "suspend" its decision and that UNC undertake another racial impact study "[un]tainted by reliance

on factors caused by past discrimination,"[76] In his comments Thomas also said that if, after restudy, the board again decided to establish the SVM at NCSU, they "must award a program of similar stature and attractiveness" to A&T. There is a flavor of "separate but equal" in that policy, which insofar as the SVM issue appears to continue to the present time.[77] And in July 1975, Martin Gerry, Acting Director of OCR (Holmes was on a leave of absence) sent a letter to the governor stating:

> North Carolina. . . (has) carried out some of the less significant commitments made in the Plan, they [the Board of Governors] have failed to fulfill the most critical commitments contained in this document.
>
> The decision by the Board of Governors, to place the School of Veterinary Medicine at North Carolina State is a direct violation of the State's important commitment to encourage desegregation of the State's racially identifiable institutions in every way feasible.[78]

Based on this and other factors, Gerry said the state had failed in its commitment to eliminate the vestiges of duality in its postsecondary system. Unless such failure was corrected within ten days, the matter would be referred to the HEW General Counsel for initiation of formal Title VI administrative enforcement proceedings. After five years, state and agency were back where they started: the threat of a cut-off of federal funds faced them again.

Finally, in August 1975, the original plaintiffs, disillusioned by agency and academics, went back to Judge Pratt and requested further judicial relief. The decisions in North Carolina were not the sole reason for the renewed legal action. Activities in all states had disappointed them. The Legal Defense Fund had reviewed

all the State Plans and the semiannual reports submitted by the states in accordance with their State Plans.* Additionally, LDF-sponsored coalitions of alumni, academics, administrators, legislators and bureaucrats -- all black -- were monitoring actions and politics at the state level. What they saw in the states and what they read in Washington convinced them that the premises of Title VI were being ignored in fact and deed.

By the late summer of 1975, North Carolina was defendant in a suit in the federal court of the state, threatened by Title VI administrative enforcement proceedings, and potentially affected by the renewed court action against HEW. All of these actions were caused, at least in part, by the Board of Governor's decision concerning the placement of the veterinary school of NCSU. President Friday might well agree with the statement (quoted by Robert Bork) of one college president that "his mother now refers to him as 'my son, the defendant.'" [79]

Following one action at a time, North Carolina responded to OCR's letter threatening to turn the matter over to the HEW General Counsel for administrative action. President Friday wrote a detailed answer addressed to the new HEW Secretary, David Mathews, the former president of the University of Alabama. In October Friday went to Washington for a meeting with OCR. Peter Holmes, who had returned to his post as Director, orally advised Friday that OCR would not object to the placement of the veterinary school at NCSU and furthermore praised the state's 1974 Plan and its efforts underway in connection with the Plan.

*Incidentally, LDF may be the sole group to have read all the documents, reports and plans submitted by the states over the course of the past eight years.

But again the note of politics is heard: Friday and Mathews had close professional associations, and had faced common political and social problems within their respective state educational systems. Once the matter was referred for initiation of administrative action to the General Counsel's office by OCR, Gerry's enforcement recommendation lost support. Mathews was new to his post and perhaps too cautious. He worked very closely with his General Counsel, William Taft. Some observers believe that Friday's and Mathews' common background may have had some effect on the outcome: no enforcement proceedings were started by Taft. Holmes told North Carolina that OCR no longer objected to the placement of the veterinary school, and for the next few months relations between Washington and North Carolina were cordial.

One North Carolina administrator summed up state/federal relations from 1974 through 1976 as follows: first was an "era of bad feelings" culminating in the July 1975 letter from Gerry; then came and "era of good feelings" and finally, starting mid-1976, and "era of no feelings" when HEW was silent and nonresponsive.

There may have been good reason for the silence from Washington. A presidential campaign was underway and Ford was battling a candidate from the South. Also, HEW had a suit on its hands.

The Adams Suit: Phase II: 1975-1977

The Adams plaintiffs, in their request for further relief, alleged that the plans approved in 1974 by OCR director Peter Holmes were not "genuine desegregation plans" according to constitutional, judicial, or HEW's own standards, and that such plans failed to eliminate the racial duality of the state systems or to promise actual desegregation. Among the factors assigned to support these allegations were state admission, retention, scholarship, and programmatic policies, faculty assignments in traditionally white campuses, program duplication and institutional inequality between black and white institutions.[80]

OCR did not dispute these allegations. Two directors of OCR gave depositions to the court. Peter Holmes, in a deposition taken in October 1975, conceded that the "general segregated pattern... remained substantially unchanged."[81] This was the same month in which he told Friday that OCR no longer objected to the veterinary school decision.

Even more damaging to future relations between the regulatory agency and the states was the deposition of Martin Gerry (OCR director, 1976-1977).

Just after the 1976 elections, in early November, Gerry addressed a meeting of the Southern Education Foundation. The purpose of the meeting was a review of the Adams situation during the prior two years. Gerry's remarks were not recorded, but they were sufficiently outspoken with respect to problems in regulating higher education

that a participant at the meeting reported these remarks to the LDF attorneys. They took his deposition in court on January 17, 1977, three days before the new administration took office.[82]

In a long statement, Gerry condemned HEW's past actions as inefficient, uncoordinated and insufficient. The state plans were "legally adequate," but subsequent state performances were inadequate in terms of policies and practices concerning black students, black colleges and black faculty. Higher education systems formerly segregated by law needed to take "remedial" as well as "affirmative action" to correct the problems of the dual systems.

Gerry's statement was very strong. In effect, the defendant conceded the case; the past actions of agency and states were repudiated, and its director was leaving.

Why did he make this statement at this time? Its impact affected the credibility of the agency in its future actions with the Adams states: it undermined bureaucratic morale for those persons left to carry on the burden of the ongoing regulation of higher education; it confirmed the plaintiffs' fears that an agency created to enforce educational nondiscrimination policies was ineffectual; and it left no choice for the court but to act.

Perhaps none of these effects was intentional; each may have been the unintended byproduct of another goal. Martin Gerry was at OCR for eight years. He had witnessed and been a part of several changes in administrative policies, enforcement procedures, and bureaucratic personnel. With a new political party and a new administration, further policy changes would follow. There is some belief

among agency personnel that Gerry hoped to stay on as director of OCR in the new administration. That may explain his outspoken remarks in the November meeting in Atlanta. By January 17, 1977, however, he knew he would not be able to stay on at the agency. The only way he could affect future policy was to state for the public record his version of the failure of the agency and his prescription for its success. The forum, the speaker and the time coalesced. Through the procedures of the courtroom, Gerry succeeded in shaping future policy for OCR long after he left his operational base. The use of the courtroom, and his statements under oath as an official, served the purposes of both plaintiffs and Martin Gerry.

Based on this damaging testimony of the defendants themselves, there was little Judge Pratt could do but find HEW still in violation of its Title VI duties. In April 1977, the court ordered HEW to notify the six states that their previously accepted plans were inadequate Title VI desegregation plans. Furthermore, HEW was to draft guidelines specifying the elements for an acceptable state plan for system-wide desegregation of higher education. The court did not review the plans. It based its finding of "inadequacy" on the statements of the defendants themselves. OCR had not, however, made any formal determination that the plans were "inadequate," nor had they informed the states that the plans were not working.

The creation of criteria was a new directive.[83] No longer could HEW vary standards to fit political needs and shape Title VI policy on a state-by-state basis. The appellate court in 1973 had commented on HEW's omitting to develop uniform guidelines for higher education. Now, four years later, the court ordered HEW to rectify this

omission. Furthermore, the court set certain standards for these criteria.

In the 1975 appellate case briefs had been filed in support of HEW by an organization of black educators (NAFEO) voicing concern for the future of the black institutions that had historically fulfilled a "crucial need" and should continue to play a role in black education. Judge Pratt acknowledged their plea. Noting that desegregation might "place a greater burden" on black colleges, or eliminate existing opportunities for black students, he said that in drafting criteria for desegregation plans HEW should take "into account the unique importance of Black colleges and at the same time comply with the Congressional mandate."[84]

The court had decided. Judicial action was more directive this time. Judge Pratt told HEW what to do and how to do it. In his order to HEW, he acknowledged the complexity of the problem for higher education. But he also tried to bridge the gap between the conflicting interests of two black groups, NAACP-LDF and NAFEO; one demanding integration now, and one arguing for the benefits of "deliberate speed."

The court set standards with conflicting goals. HEW and higher education are in the middle. Whatever choice they make consistent with one goal can be -- and probably will be -- challenged by advocates of the other goal. The court made a decision, but it did not ease the dilemma of choice.

THE WASHINGTON STAR Thursday, December 15, 1977

COLLEGES AND FEDERAL HARRIERS

The racial barriers once enforced by law at public colleges and universities in the South have been gone for two decades now - and good riddance. But federal judges and bureaucrats who long for new worlds to conquer are not appeased by what is, by any measure, astonishing progress.

"We're not dealing with schools that flatly exclude blacks," said David Tatel of HEW's Office of Civil Rights the other day, commenting on his agency's current clash with Southern higher education officials. "Exclusion" would indeed be a ridiculous term to use, for instance, of the universities of Virginia and North Carolina. Their black enrollment is now 6 per cent and growing. But according to Mr. Tatel, "what we're down to are the subtle vestiges of segregation, like duplication of programs at white schools and failure to go after black students as enthusiastically as white students."

No one at the public institutions involved denies that such "vestiges of segregation" exist, or that action against them is in order. The question is, how much, how soon, and by what means? Since civil rights groups brought an enforcement suit here in Washington several years ago, mountains of documents and plans have accumulated. But fundamental differences remain.

One issue is how, in a free society, you force whites and blacks in a voluntary system of education to sort themselves in line with the extravagant and unrealistic goals of judges and bureaucrats - and on their equally unrealistic timetables.

Another is how you compel public colleges and universities that are mostly white to hire more black administrators and professors, and recruit more black students, while simultaneously meeting a legal mandate to "upgrade" historically black institutions in the same system. The two goals are, in fact, imcompatible; neither can be served without serious cost to the other.

Of course, the judges and bureaucrats have succeeded in removing "vestiges" of racial segregation in public school systems, at least at their own satisfaction. Attendance up to a certain age is required, so that racial balancing by the numbers could be enforced. The result has been sadly counterproductive in many systems: more, not less, racial segregation - with blacks in public schools and whites in private schools. This sad result of well-intended zeal is not confined to the South. Busing, according to the latest figures, has cost the public schools of Boston about half their white students.

In higher education, which is voluntary, the judges and bureaucrats are powerless to compel racial balancing. They can only cajole and threaten. They have asked for sweeping blueprints of change in which certain numerical "goals" are promised. But as integration proceeds (the University of Alabama, according to a recent story in THE NEW YORK TIMES, now has more black students than do Harvard, Yale, Princeton and Dartmouth combined) the pressure from Washington only increases. It takes many forms - pressure to lower

admissions standards, pressure to lower administrative and teaching standards, pressure to attain numerical quotas that are, if attainable at all, utterly unattainable within the timetable insisted upon, pressure to spend even larger amounts of money on remedial courses. (North Carolina, for instance, will probably spend about $1 million this year to correct disparities of preparation.)

To no one's surprise, some of the state systems are beginning to weary under the pressure. They believe they have reached a sticking point beyond which they cannot go without compromising academic standards, and beyond which they cannot promise to go without dishonesty and bad faith. They believe they are in reasonable compliance with Title VI of the 1964 Civil Rights Act, the relevant law, and they are. They wonder why they, alone among all recipients of federal funds for higher education, must be pushed beyond reason while most of the nation's public and private institutions - many far more segregated than they - feel no comparable pressure from Washington.

This under-publicized clash, which again is not over segregation but about what bureaucrats are pleased to call its "subtle vestiges," has become an important test of national policy. It is a test in which the utopian demands and insensitive ideological expectations of judges and bureaucrats must be weighed against the academic integrity of free institutions - institutions voluntarily supported by taxpayers which serve students and teachers who remain free to choose for themselves where they will study and teach.

Thus far the matter has not gone beyond negotiation. But that may now change. The institutions are telling Mr. Tatel and his harriers that they will not hesitate to put their case before the Supreme Court. Nor should they. If they do, we believe they will prevail - and should.

"The government is going where it shouldn't go and making us do what we shouldn't do," President William Friday of the University of North Carolina was quoted as saying the other day. These are not the words of a George Wallace, but of the most distinguished university president in the South: a man whose quiet leadership for racial equity in higher education has been long and persistent. "Washington is wrong on this one," he added. If so - and we share his view - we must add that it would not be Washington's first error.

THE POLITICS OF REGULATION: THE SECOND PHASE: 1977-1978

The New Administration

January 1977: An old problem, Title VI nondiscrimination, and a new administration. Democrats replaced Republicans, Jimmy Carter replaced Gerald Ford. Joseph A. Califano, Jr. took over from David Mathews as Secretary of the Department of Health, Education, and Welfare, and Peter Libassi returned to the Department as General Counsel.

Years earlier, in the last Democratic administration, Libassi had been Special Assistant for Civil Rights under Secretary John Gardner (1966-1967). Since then he had served as executive vice president of the Urban Coalition. In his most recent post, director of a private urban development effort in Connecticut, he had experienced the other side of Washington regulatory agencies (HUD). He had dealt with the pressures of Washington on one side and local interests on the other. Thus, he brought to his new post a background in law and civil rights and administrative experience; he would need them.

The Adams suit was only one part of a vast set of problems to greet the new HEW administration. Regulations to accommodate the handicapped (the so-called Section 504 regulations); admission of American medical students with two years of training abroad to American medical schools; and federal payments for abortions for welfare recipients, were just a few of the immediate issues they had to face.

Inauguration Day came just three days after Martin Gerry gave his deposition in the court. Almost two and one-half months later, on April 1, 1972, Judge Pratt delivered his opinion ordering HEW to develop criteria to guide the states in preparing new desegregation plans for their systems of higher education. HEW was given 90 days to submit the guidelines to the court, after which the states had 60 days to submit new plans based on the HEW criteria. The Department was given 120 days to evaluate and accept or reject the state plans. The relevant dates for the parties were: July 5 (criteria submitted); September 5 (state plans submitted to HEW); and January 5, 1978 (plans approved by the agency submitted to the court). Any state whose plan was not approved would be subject to administrative proceedings leading to termination of federal funds to the state higher education institutions or systems found to be in violation of Title VI obligations. On January 5, 1978, the court granted HEW a one-month extension for a decision on the state plans. The deadline is now February 5, 1978.

Although the Adams states had struggled with plans and federal policy for seven years, Califano and Libassi were for the first time being exposed to the difficulties of implementing Title VI's antidiscrimination policies in formerly segregated systems of higher education. They wanted to bring to the regulatory process a fresh approach.

Several factors influenced their desire for a new approach. There were political pressures: the Republican administration had mishandled the process, therefore the Democrats must do better.

There were agency pressures: by the admission of their own Directors, OCR had failed to regulate. The pattern of duality in public higher education remained substantially unchanged. Agency personnel were demoralized; their ten-year efforts condemned as inefficient and ineffective. Personal pressures played a part, too: the new administration at HEW wished to succeed where others failed, to achieve a better life for all people, black and white, to affect social change to meet the goals of equal opportunity, and yet to support the institutional values of academia. Lastly, and most important, there were legal pressures: Califano and Libassi recognized and responded to the command of Constitution, court and Congress to protect -- and assure -- the legal rights of minority groups who have suffered discrimination.

Thus, the new administration of HEW had large stakes in the outcome of the Adams suit. By July 5, 1977, they developed a new approach to the regulation of higher education. Whether this approach responds satisfactorily to all of these pressures is too early to tell. But the interactions between HEW and representatives of higher education may provide a clue to some answers.

HEW: The Process of Shaping Policy

The responsibility for defending the Adams suit and responding to court command fell upon the General Counsel's office. Therefore, Libassi was in charge of developing the criteria. Several drafts of the criteria were produced.

The earliest version reflected the legal and civil rights background of HEW-OCR and of Libassi. The first draft relied primarily on techniques utilized in the public elementary and secondary school desegregation cases. This draft was vulnerable to political attack since, at this stage, the criteria did not take into account the special character of higher education. Therefore, the draft could be stigmatized as "educationally unsound."

Califano was not pleased, and asked that Libassi involve all the HEW offices concerned with educational policy in the process of developing the criteria. Libassi and the Deputy Assistant Secretary for Education, David Breneman, a young man on leave from the Brookings Institution, had the lead responsibility. They were joined by representatives from the Office of Education, the offices of the Assistant Secretary for Education and the Assistant Secretary for Planning and Evaluation, the National Center for Education Statistics, OCR, as well as the General Counsel's office.

This cooperative endeavor was unique in the history of civil rights regulation at HEW. For the first time, persons responsible for civil rights and those responsible for educational values met in the conference room.

There was one weak link, however, in the intra-agency collaborative process which developed the final draft of the criteria. After Martin Gerry left in January, the post of Director of OCR was vacant for several months, during which period Califano named Libassi Acting Director. Libassi's dual position brought OCR out of isolation and into policy development. The appearance of collaboration had an

artificial quality, however, because it was only by circumstance that Libassi held dual responsibility. Libassi had no experience with the special problems and practical difficulties of implementing Title VI civil rights policy in systems of higher education. Therefore the problems of implementing policy were not given sufficient attention during the process of developing the criteria policy. David Tatel, Gerry's successor as Director of OCR, came to HEW in May and did not take part in developing the guidelines until fairly late.

During this period, Libassi and Breneman met with the state educational administrators, collectively and individually, in Washington, and made visits to each of the six states which were still involved in these proceedings. For HEW, on-site visits by senior agency personnel were extraordinary, and they were successful in terms of rebuilding trust and good will between regulator and academic.

Other parties were consulted, too: interest groups such as the Legal Defense Fund and coalitions sponsored by the LDF, as well as the organization of black educational administrators (NAFEO).

Less successful in generating good will was a meeting on June 1 with a "blue ribbon panel" of educators. Many participants felt that the top administration of HEW was clinging to "elitist" (and implicitly racist) views: i.e., sacrificing equal opportunity goals to entrenched concepts of academic standards and "values."[85]

The clash of opinions and judgments that occurred at this meeting reflected political differences. At the policy level,

difficult choices must be made between competing values: equal educational opportunity versus institutional quality and academic standards. What from one perspective is "lowering" admission standards can be seen from another viewpoint as more "flexible" admission policies; what is perceived by some as unnecessary duplication of resources or preservation of low-quality institutions may be, in reality, a political necessity or expedient way to provide opportunity for those who might otherwise not have any. There is no satisfactory way to reconcile these issues; there can only be an ordering among alternatives.

Because these issues involve value choices the ordering of alternatives was really a political rather than a legal judgment. The final criteria, the product of consensus among the various educational groups within HEW, was a process of negotiation among competing interests wich competing aims, in and out of HEW.

The Substantive Standard of Elimination of Duality

Of course, no matter how political the process, the criteria could not ignore the substantive standards of the law: the Constitution and Title VI. The end result -- the goal -- of regulation had to satisfy these standards.

For both HEW and the state systems of higher education, the substantive goals were to achieve equal education opportunity (Brown v. Board of Education) and to eliminate racial duality (Green v. County School Board). The standard against which these goals were measured in the public school cases was the racial composition of

public school students and teachers compared with that of the general community. By this standard, statistical data prepared by OCR showed the following patterns within the systems of higher education in the Adams states:

- Enrollment rates for black and white twelfth grade students entering into postsecondary education were very different.
- Of this "entrant population," there was a substantial difference between blacks and whites in the kind of postsecondary institution each entered.
- Within the collegiate population there were substantial differences in black/white achievement, measured by attrition rates and entrance into post-graduate programs.
- There were substantial differences between black and white teachers and administrators as measured by academic credentials and by the place of employment within the constituent institutions in the public systems of higher education.

In short, there was adequate statistical evidence that two systems existed, one for blacks and one for whites. In North Carolina, for instance, statistics from OCR[86] show that in 1976 out of the 12th grade pool the rate of enrollment for high school graduates going on to some form of postsecondary education was 62.8 percent for black students and 75.1 for white students. The black postsecondary enrollment rate was close to that of the white. If the white participation rate is designated as par, the black rate is 83 percent of par.

But there was a substantial disparity in where these first-time enrollees went within the postsecondary system in North Carolina. Although 18.2 percent of black entering freshmen went to some four-year institution in the senior system of the University of North Carolina, only 3.9 percent entered a traditionally white

institution and only .9 percent went to the flagship institution, UNC-Chapel Hill. Comparative data for white freshmen show that 22.4 percent went to traditionally white four-year institutions, 4.2 percent to Chapel Hill.

Disparity -- the difference between the proportion of blacks and whites entering the traditionally white institutions as freshmen -- was 18.5 percent.

Although a smaller percentage of black than white students graduating from high school go on to postsecondary education (62.8 percent vs. 75.1 percent), of those who do, the proportion of black and white students who go on to some four-year institution is almost the same (28.9 percent vs. 29.9 percent). Conversely, the proportion of the first-time enrollees who enter the two-year institutions is 71.1 percent for blacks and 70.1 percent for whites. (See Table 1, Appendix C).

Now is the Winter of our Discontent: North Carolina and the Adams Criteria

One of the fundamental objectives of the criteria was to bring traditionally black institutions up to a par with the academic quality and resources of the historically white institutions in order to close the gap between black educational achievement and white educational achievement.

The states subject to the Adams court order and the Title VI regulatory process received the criteria on July 5, 1977. They had until September 5, 1977 to respond and submit their new state plans to HEW.

Summer is generally a relaxed time for academics, but for the administration and staff of the University of North Carolina the summer of 1977 was very hectic. Plans which commit the state to future action must be authorized and approved by the various boards and officials involved in the North Carolina response to HEW-OCR.

Since he was the only official with jurisdiction over both branches of postsecondary education, the governor and his staff had to review and approve the plan. 1977 was election year and the governor was campaigning hard in favor of an amendment to the North Carolina Constitution which would permit the chief executive of the state to serve two successive terms. Campaign politics would affect the governor's reaction to the plan proposed by the Board of Governors of the University of North Carolina.

The need for others to review and approve the plan meant that the president of the University and his staff had first to prepare a response for consideration by the educational planning committee of the Board of Governors of UNC. Then, the proposed plan had to be submitted to a vote of the entire Board of Governors after which the governor's staff had to make comments, and finally it had to go to the governor for approval. To meet these requirements, the administrative staff of UNC had to have a proposal ready for consideration by the planning committee by August 10, 1977. The response recommended by the board went to the governor's office on August 22, and he was to submit the plan to HEE on September 2, 1977.*

The process proceeded fairly smoothly and the response was prepared according to schedule. Friday and his staff consulted

*See next page.

with the chancellors of the sixteen constituent institutions. He also sponsored a day-long meeting with the chief academic officers and the admissions directors of each of the institutions to hear their perspective of their particular problems.

The most newsworthy event during this process was the formal vote of the Board of Governors on August 22, 1977. The five black members of the board (the statute mandates minority representation on the board) were not entirely pleased with the proposed North Carolina response. In fact, some were very critical. Of the five, one voted against the plan, one abstained, and two voted for the plan. The fifth, Julius Chambers, resigned in protest. His resignation generated headlines and from some quarters a sigh of relief. Chambers is President of the NAACP-Legal Defense Fund, the group that funded the legal efforts in the Adams suit. Politics and law make strange bedfellows.

Since September 5, 1977, members of the staff of OCR have been reviewing each state plan. One staff member is assigned to review and evaluate each state's plan according to the criteria and the legal standards stated by the court. An HEW lawyer assigned to OCR coordinates and reviews these evaluations.

*Entitled The Revised North Carolina State Plan for the Further Elimination of Racial Duality in Public Higher Education Systems, Phase II: 1978-1983 (Hereafter called State Plan-II).

David Tatel, Director of OCR, sent letters to the states commenting on responses which were unclear or failed to meet the goals stated in the criteria. Since at the last moment HEW received an extension of the deadline for their response to the court, none of the plans submitted by the six states has yet been approved; negotiations are still in process. Therefore, it is inappropriate to comment about North Carolina's State Plan-II, except to note the areas where HEW-OCR and North Carolina have differing views concerning the goals.

Theory and Practice

Two courses of action having to do with the approach taken by the new administration in responding to the court's order are important enough to review. The first, the process of developing the criteria itself, has already been discussed. Instead of lawyers drafting regulations in isolation, the HEW task force mediated and negotiated among various groups, within and without HEW, concerning the appropriate standard for elimination of racial imbalance in institutions of public higher education.

However, they were not entirely free to set any standard for academia. The criteria had to meet the legal standards for achieving the goal of educational opportunity and elimination of racial duality. The substantive content of unitary educational systems had been described by the courts in a number of opinions. The courts also prescribed remedies to achieve this substantive outcome, a racially balanced unitary system.

The judicial remedies to correct racial imbalance (eliminate duality) in public schools (compulsory systems) are:

- reassignment of students and personnel (teachers and administration;
- affirmative action employment policies to correct a disparity between population racial composition and school personnel;
- special curricula (remedial, bicultural, bilingual) to meet all students' needs.

The major issue was how to attain the legal standard of educational equality (elimination of racial imbalance throughout the system) in voluntary (noncompulsory systems of higher education) and within academic traditions of autonomy, student self-selection and institutional admission standards based on academic quality.

The answer which HEW submitted was to give the state educational systems a shopping list of goals and outcomes. HEW told them what they should aim to do but not how to do it! This was a unique approach. In contrast, in Boston the court has maintained continuous supervision over the Boston public school system, even placing one of the city high schools into court receivership. As one recent report says: "Court jurisdiction will continue indefinitely until the judge decides that equal protection...has been accomplished and is self-maintaining."[87a]

In theory the goals and outcomes approach would affect the process of response at the state level. The states would adopt the goals and outcomes as their goals and then voluntarily devise and implement ways and means to change the state public systems of higher education in the direction of the goals and outcomes.

The goals approach neither directed specific results nor directed specific remedies and methods. There are several reasons

for this terminology; the Secretary's press statement said this:

> They [the criteria]...should advance equal educational opportunity for all races and...allow the States to maintain and improve their standards of educational excellence.
>
> They do so in a fashion -- and I believe this is very important -- that emphasizes results but that, at the same time, leaves substantial discretion to the States as to the best methods of achieving those results.[87]

Furthermore, the Department stressed not only the nonintervention-tionist aspect of their approach but also that the goals were not arbitrary demands but standards toward which the states should aim. Again in his press statement the Secretary said:

> The Department is opposed to the use of arbitrary quotas in civil rights enforcement. Failure to achieve a goal...will not be sufficient evidence, standing alone, to establish a violation of Title VI.[88]

An administrative mandate (Title VI) to regulate achieved a political result. Instead of regulating the target population, the agency depended on the voluntary efforts of the public systems of higher education to achieve the result desired by the federal agency. This was either a unique experiment in promoting self-regulation, or a way to catalogue its failure.

There is one problem with this approach, however: how is OCR to implement this policy? How are they to evaluate state efforts and measure state performance? HEW policy put the monkey on the back of higher education; but the court and the plaintiffs were on David Tatel's back. He had to be able to assure both court and plaintiff that substantive goals would in fact be achieved. At that point the theory of regulatory nonintervention and the practice of regulating go their separate ways. It is the agency's duty under Title VI to assure minorities that the regulatory process will

achieve the substantive goals of nondiscriminatory reality, i.e., racial balance. Then, much as Libassi and Califano do not want to regulate the academy, goals may become the standards by which performance is measured: goals become quotas.

To achieve substantive outcomes through regulatory policies based on goals and outcomes while respecting autonomy and nonintervention, the target group -- academia -- has to believe that a) the projected goals and outcomes are realistic (capable of being achieved) and that b) the outcomes are consistent with the educational norms of the academic system. If these two elements are present, then a regulatory policy based on voluntary efforts by the regulated may succeed. But if academia feels the stated goals and outcomes are neither consistent with educational values nor capable of realistic achievement, regulation depending on voluntary effort will not achieve the agency's goals. In such cases, if the agency believes the outcomes are absolutes, regulators must command.

The Criteria

The criteria submitted by HEW to the court in the Adams case are attached to this paper as Appendix A. Only a brief summary of the criteria will be given here.

The criteria state the "elements" necessary for elimination of duality within a public system of higher education. The most important elements are: 1) to create a unitary system out of the present racially imbalanced or dual system; 2) to desegregate student enrollment; and 3) to desegregate non-academic personnel

as well as academic faculty, administration and governing boards for each institution.

The first "element" of the criteria -- elimination of duality -- concentrates on the academic institutions and their programs in order to overcome the effects of past discrimination on traditionally black institutions. Academic missions, programs (elimination of duplicative programs and placement of new programs) and upgrading facilities are among the issues considered in this element. The intent is to make the traditionally black institutions as attractive to potential students and faculty as the traditionally white institutions. In connection with this institution-oriented section, the criteria (Section I.F.) require a commitment from the state to advise OCR of any proposed "major" changes in the state system of higher education prior to their formal adoption.

The second element, desegregation of student enrollment, is more specific than the first, both in terms of what is to be achieved and when. There are several parts to the student-focussed goals. The first three concentrate on eliminating disparities in enrollment. One is to eliminate any disparity in the ratio of black and white high school graduates who go on to postsecondary education: the goal is to achieve parity between the races in rate of entry into the postsecondary system; parity is defined as the entry rate of white 12th grade students entering the postsecondary system. The second part of the section dealing with students is designed to eliminate up to half of the racial disparity among first-time enrollees entering traditionally white institutions within five

years; but such increase in black enrollments in TWI's need be no greater than 150 percent of the number of black students admitted to TWI's in 1976-1977. Third, the state is to achieve racial parity in the number of undergraduates going on to postgraduate programs in the state. In addition, in connection with this student focus, the state is to eliminate racial disparities in attrition rates throughout the various levels of the system and encourage transfer from the community college system to the senior system.

In keeping with the protective aims of the Adams order (not to harm the traditionally black institutions), no goals are set for white student enrollment in black institutions until such TBI's are up-graded in the direction described by the goals of the first section.

The element which concerns personnel policies in each institution states the goals in terms of academic and administrative posts requiring masters and doctoral degrees. Below the doctorate level, each institution must achieve parity between the number of masters-level positions and the number of students graduating with masters degrees in the state, or the number with such credentials in the relevant labor market. For doctoral-level positions, parity must be achieved between position-availability and the number of blacks with the requisite credentials in the relevant labor market. For non-academic or nonadministrative personnel, the number of black staff is to be on a par with the number of blacks within the relevant labor market. There is no time deadline set for attaining these personnel goals.

The Points of Difference: HEW and North Carolina

North Carolina and OCR have serious differences of opinion on some very basic issues. Fundamentally they differ on the substantive demand of the law, Title VI and the constitutional cases, insofar as the legal standard applies to public systems of higher education.

The Supreme Court has not considered the problem of desegregation remedies in a situation like the one facing the University of North Carolina. Bakke is the first Title VI higher education case to be heard by the Court. The outcome of the Bakke case may affect the North Carolina situation. On the basis of the present legal situation, persons of good will, North Carolina administrators and HEW-OCR administrators, may well disagree on the legal requirements.

Because they have differing interpretations of the limits of the law they have differing opinions concerning the meaning of "duality" within the context of North Carolina's system of higher education. OCR emphasizes a concept of racial balance and North Carolina emphasizes a concept of freedom; freedom of choice, association and academic values. Neither side may be entirely right and neither entirely wrong.

But notwithstanding differing opinions on the basic situation, law and remedies, the state and the educational systems are committed:

1. To increase the proportion of black citizens availing themselves of higher educational opportunities in the public systems of higher education;

2. To encourage further racial integration of the student populations of the public institutions of higher education; and

3. To insure that the quality of educational opportunities available to both black and white citizens is equally high.

(State Plan-II, p. 6)

There are three major areas of concern to the university. First, there is a problem of institutional autonomy and the federal/state relationship: Section I.F. of the criteria requires the state to report any major proposed changes in the system prior to formal adoption. Aside from the latent ambiguity in the phrase (what is "major"?) which leads to continuing tension between the state and the agency, the "Big Brother" image is inconsistent with the declared purpose of the criteria themselves: to protect institutional autonomy. This issue is politically charged; both federal/state issues and issues of academic autonomy are at stake. Senator Helms and Congressman Fountain and other members of the North Carolina congressional delegation met with David Tatel in early December to discuss the OCR-North Carolina situation, and this "notice" requirement was a major topic of conversation.

Other major issues affect many different responses in the State Plan-II. Basically they fall into two categories: concern for educational values and concerns of practical realism. In operation, of course, what is realistic is determined by educational values. It is claimed that educational values are threatened by specific, numerical goals for black student enrollment in the traditionally white institutions.

The criteria state a five year goal for bringing new black students into the white institutions. The goal for the University must be to bring the first-time enrollment figure for black students in traditionally white institutions from 951 (1976 black first-time enrollment) to 2375 by 1982-1983.[89]

North Carolina approaches the problem of eliminating duality in a different manner. They consider the relevant goal as an increase in the percentage of total black enrollment throughout the traditionally white system. The real problem is numbers: is OCR stating goals or quotas? HEW in its letter of comment to the state (November 7, 1977) said of the differing points-of-view, "If the goal, as you expressed it, does not meet the Criteria, we will request that it be revised to do so."[90] Has the goal become a command? What will be the effect if North Carolina fails to meet this goal? Later OCR said, "no finding of non-compliance will be made if a goal is not met as long as all good faith efforts were made to achieve it."[91] How will good faith be measured by OCR and the Adams plaintiffs?

The parity-related goals, for students and academic personnel, beg the question of responsibility for academic standards and academic quality: admission, retention, curriculum are but a few of the traditional academic norms threatened in this problem.

At present the admission systems of the University of North Carolina for each institution are based on a combination of SAT scores and class rank. The court has said that corrective measures are not to harm the black colleges. Therefore UNC cannot direct the better students to specific campuses. The must attract new students

into the system. The spread in average combined-SAT scores between institutions within the system is more than 500 points. The traditionally white institutions are at the high end. Does good faith then demand special or at least different admission procedures? Do such programs do more harm than good? Do they set apart (stigmatizing) those whom they wish to draw in (integrate) and introduce a "tracking system" into higher education? In a letter to the North Carolina congressional delegation, David Tatel indicates "the goals do not require the admission or employment of unqualified persons." [92] Who is to determine "qualified" persons; academics or agency?

In December a North Carolina black interest group, the North Carolina Alumni and Friends Coalition, sent a response to the State Plan-II to David Tatel at OCR. In this response they suggested that enrollment standards include "non-traditional criteria such as motivation, goal orientation, persistence and other non-intellectual criteria should be given equal weight with SAT scores and other current admissions criteria." [93]

Each institution in the North Carolina system uses a combination of class rank and SAT. Beyond class rank how will these "non-intellectual criteria" be evaluated? The response of the Alumni says that current practices are inadequate: what is adequate? No one, neither academics nor HEW nor others, has suggested an answer to these difficult questions.

Given the uncertainties of evaluation by HEW or others, the University prefers a goal for enrollment which recognizes the realities within the state and should be achievable within these realities: what is in fact possible should be the standard for review. But who is to define the realities?

Another major area of difference is the goals which aim to bring the black institutions up to par with the white institutions. No one in North Carolina questions a requirement that underqualified institutions should be improved. Educational administrators, governors, legislatures and voters have supported the efforts to make the five traditionally black institutions more nearly equal in quality with other institutions within the North Carolina system. For instance, since 1973 the legislature has appropriated and the voters of the state have authorized (through a bond referendum) $28,484,600 for capital improvements at the five traditionally black institutions,[94] and even more has been requested by the University.

The goal of institutional equality (parity) raises the question: equal to what? Does institutional equality require the state to create another major research university? For instance, it is clear that new programs need academic support systems. The criteria, however, require commitments from the state to give priority consideration to placement of new programs at the traditionally black institutions. OCR's November letter to the state points to this as an important consideration. Furthermore, in commenting upon the institutional classification system utilized by the University in its State Plan-II, OCR says: "the five-tier categori[es]...[do] not permit the five traditionally black schools to be compared to any of the State's leading institutions."

Since resources are limited, is another Chapel Hill economically feasible from the legislature's viewpoint or educationally desirable

from the Board of Governors' perspective? Or anyone's? Again, this is a matter of judgment and opinion; law and politics. The choices and decisions that are made depend on where one sits. The answer to the question "how much is enough" will be answered differently by each group involved in the Adams case.

The basic problem is: Who is to make the final decision?

CONCLUDING COMMENTS

Here is the antidiscrimination regulatory process at work: a wonderland of conflicting voices. This may be the most extreme example of the interactions between federal regulators and academics but there is no reason to think it is or will be unique. The recent PEER report recites a story of HEW-OCR ineptitude concerning Title IX (nondiscrimination on the basis of sex) similar to that concerning Title VI which the Legal Defense Fund documented when they requested judicial intervention on behalf of black citizens in 1970. In a few years national organizations representing handicapped persons, or older persons -- groups now included in the antidiscrimination policies of the federal government -- will undoubtedly raise the same issues. All federal statutes enacted since 1964 to protect the rights of a new group of individuals modelled their nondiscrimination language on Title VI, and each links the antidiscrimination standard to the ultimate sanction -- loss of federal funds, through federal grants and contracts, student financial aid, or federal mortgage support for buildings and dormitories. Each may involve regulatory processes similar to those detailed in this paper. (See Appendix D).

Education is both instrument and object of the antidiscrimination policies of the federal government and individual interest groups. Federal policy has drawn a link between employment opportunity and nondiscrimination policies. The plaintiffs in the Adams suit drew a link between education and professiona opportunity in

the ten southern states. Other state systems are also the object of the LDF's attention because disparities in educational opportunity mean disparities in occupational achievement.

Many university systems may be subject to Title VI regulation. The original determinations of noncompliance with Title VI made by HEW-OCR in 1969 and 1970 for the ten Adams states, were not based simply on the fact that the public higher education systems were those of states that had been segregated by law. Rather, the determination was based on the showing of disparities between the educational opportunities for black and white students: differences between their rates of entry into higher education, where they went when they entered, and their performance afterward. Perhaps it was easier to demonstrate these disparities in public higher education systems that had previously been segregated by law; in 1965 and 1970 the effects of past discrimination still remained. But these effects can be shown in other systems as well. Many non-de jure states show statistical evidence of systematic inequities linked to race-related differences in opportunities for higher education. The percentage of black students at the University of North Carolina, Chapel Hill is no lower than, and indeed is higher than, minority percentages at the flagship institutions of some other state systems of higher education. (See Appendix C, Table 5.) Therefore, no administrator, academic, or concerned citizen can afford to ignore the regulatory process which has entangled the University of North Carolina and HEW-OCR for the past few years.

The Adams case and the regulatory process which has been connected with Title VI has had an emotional effect on all persons involved at the University of North Carolina. From students to governors, there are bad feelings about the politics of regulation under Title VI, and consequently, bad feelings about the law itself. Why North Carolina, not South Carolina, where the racial situation appears to be even worse? Some feel it does not pay to try to improve educational opportunity, because nothing is ever enough. Others, especially faculty, think Title VI will never be enforced, since they think that the sanction, the loss of all federal funds, is too drastic for university and government alike. A regulatory process subject to such a variety of opinions, none of them good, is not respected. It may be fair to say that whatever efforts have been made to improve educational opportunity for blacks in North Carolina have come because the educational administration and people of North Carolina wanted such improvement and not because they were regulated into doing it.

This is not to say that the Title VI regulatory process has had no effect within the state. It has. It has made people more conscious of their actions and more aware of the complexities and delicacies of the decision-making process in higher education. There is evidence that the annual rate of growth in black enrollment in all six Adams states has increased since legal action was started in 1970. (See Appendix C, Table 4.) But it is not possible to know what would have happened in the absence of regulation. "Did they fall, or were they pushed?" The answer is uncertain. In the long run there should be better ways to raise people's consciousness than to harry them.

The effort to achieve the goals desired by OCR will force the legislature to make expenditures on behalf of the public system of higher education beyond what they would have in their absence. Furthermore, they will commit the state systems to make greater educational efforts on behalf of students presently not in the system. Many of these efforts will depend on the affirmative cooperation of administration and faculty of the constituent institutions. The goals require new ways of approaching admissions procedures, special curriculum development, new teaching methods and new ways of evaluating educational performance. The regulatory process, however, has only dealt with the senior level of administration of the system; the president's office, his staff and the Board of Governors. It has not gone into the field to reach those who must carry out these commitments and the changes in policy which follow.

Regulatory bureaucracy seeks bureaucracy in the systems it regulates. Within the context of prior industrial experience, regulators pushing on the top effect changes at the bottom. The academic system is different, and federal regulators do not respect the difference. Instead they attempt to force academia to become more like the bureaucratic systems with which they are familiar. To meet the goals and commitments of a statewide plan, the Board of Governors and the president's office will have to become more involved in the educational process in the constituent institutions. The university system will gradually be forced into a more hierarchical, less collegial, more bureaucratic template.

Yet, nondiscrimination regulation will not go away. The individual rights that are protected by constitutional nondiscrimination legislation are important social realities, premised on fundamental concepts of our form of government. Nor will the style of antidiscrimination legislation change: broad, sweeping language compacted into one brief statement of rights. There are always differing opinions concerning any social policy, particularly the application of that policy to social facts. Congress may have a collective desire to protect individual rights, but the 535 members of Congress can never collectively agree on the precise definition of those rights nor when they have been infringed upon in particular instances. Thus they create a brief statute couched in abstract language and charge a regulatory agency with the duty of applying the broad policy to a variety of complex concrete situations. HEW enforces more social legislation than any other agency. It is more involved in the interactive patterns of our social behavior than any other agency. That alone may account for the excessive turnover in personnel at HEW. It is emotionally wearying to be in the decisional hot-spot, responsible for so many political determinations affecting the population at large.

New regulatory processes must be developed which respect the structure and norms of academia and yet guarantee that academia acts in a manner consistent with social policies. Mediational and participatory techniques may be part of the answer. Academia feels the burden of the present system; academia must be instrumental in developing a better system. Institutions which feel threatened by

encroaching bureaucratic control from central administrations can avoid such control by cooperative inter-institutional efforts to achieve the goals of antidiscriminatory policy. Systemwide councils and faculty senates are existing organizational structures within the multicampus university that could take leadership in inter-institutional cooperation for programs and services not presently available. But these groups so far have failed to take a leadership role. For instance, a recent Carnegie Council report indicates that intercampus cooperation is encouraged in North Carolina through systemwide budget support. Despite this support of their "system-wide councils to encourage multicampus programs, campuses generally work out their own arrangements."[95] The tension between theory and practice mentioned in connection with HEW's regulatory approach in the criteria is echoed again within the North Carolina system. In the situation presently facing the University, failure to cooperate at the institutional level will impose a duty to command on the administrative level.

Five Massachusetts colleges in the Connecticut Valley provide a good example of intercollegiate cooperation. They have created a five-college system of courses and programs; exchanges among the campuses. Cross-registration is simple and a regular bus service (operated by the consortium) routinely connects all the campuses. If this kind of cooperation can be achieved among five different universities, one public and four private, it should be possible for a public multicampus system to do the same. But in North Carolina, for instance, there is no regular transportation between

the Chapel Hill campus and Central's campus, although they are only ten miles apart.

Nondiscrimination regulations affect the rights of individuals, as well as those of groups. Those rights cannot be curtailed by private actions, state action or regulatory action. In our constitutional democracy, decisions concerning infringement of personal rights are always subject to review by the courts. This has always been true for constitutional rights and it may be true for individual rights under Title VI. That is one of the issues in the pending Bakke case. When individual rights are at stake, only the Supreme Court has the final say in the outcome.[96]

Nonetheless, for administering the nondiscrimination statutes and applying the instruments of affirmative action, procedures can be developed so that determinations of individual rights and regulating education is accomplished in an orderly manner, one step at a time. Administrative processes can help sustain regulatory decisions if they are sensitive, systematic and orderly. Courts may then be more willing to defer to the judgments of administrative decision-makers. As Professor Davis says:

> Whatever the formulas, good judges customarily tread lightly when they are impressed with the care, conscientiousness, and balance of the administrators, but they penetrate more deeply, sometimes even substituting judgment when the administrative performance seems to them to have been slovenly.[97]

Lessons learned in antidiscrimination efforts, such as the provision of new educational support systems and new community services, may soon be invaluable. Shrinking demand will pose even greater problems for higher education than do race relations. To

respond to them successfully, universities now and in the future must learn how to draw new people into the system, and the tools of affirmative action can well be adapted to this task.

The clarity of observation, neutrality of evaluation and dispassionateness of judgment on which the academy prides itself can be turned usefully on its own problems. Quick to reform others, the academy is slow to reform itself.[98] This is worse than elitism; it is suicide.

Many of the difficult problems underlying the issues in the Adams case are susceptible to analysis by the learned. Instead of using it only for writing briefs in support of special admissions programs (which implicitly protect the traditional standards of academic admissions), academic energy might in the long run be more beneficially applied to rethinking the problems of measuring individual ability, predicting capacity and evaluating performance. Few educators till this field.

Neither traditional academic attitudes and procedures, nor traditional regulatory processes as practiced by HEW-OCR meet the realities and needs of the present situation. Nor does the mere condemnation of the regulators, or the continued constriction of academic autonomy provide the answer. A better way must be found.

FOOTNOTES

PROLOGUE

1. Adams v. Richardson, 351 F.Supp 636 (D.C.D.C. 1972, as amended, 1973) (hereinafter cited as "Adams I"); Adams v. Richardson, 356 F.Supp 92 (D.C.D.C. 1973) (hereinafter cited as "Adams II"); Adams v. Richardson, 480 F.2d 1159 (C.A.D.C. 1973) (hereinafter cited as "Adams III"); Adams v. Califano, 430 F.Supp 118 (D.C. D.C. 1977) (hereinafter cited as "Adams IV").

   Throughout this paper, unless otherwise noted, the four Adams cases will be referred to as "the Adams case."

2. Horowitz, The Courts and Social Policy (1977), p. 60.

INTRODUCTION

2a. Maine, Ancient Law (1861) (Dent Edition, 1954), p. 100.

3. 42 U.S.C. §2000c-1 (1964).

4. Executive Order 11246, 30 Fed. Reg. 12319, as amended, 32 Fed. Reg. 14303, 34 Fed. Reg. 12985 (1973).

5. 42 U.S.C. §2000d-3 (1964), as amended, Pub.L. 92-261§3, 86 Stat 103 (1972).

6. C. Finn, unpublished manuscript, Chapter VI, p. 32. C. Saunders, "Federal Regulation vs. More Self-Regulation," Princeton Alumni Weekly, September 12, 1977, pp. 26-27. See also, C. Finn, "Federalism and the Universities: The Balance Shifts" in Change Magazine, Vol. 7, No. 10, December-January 1975-76.

7. Allison, Essence of Decision: Explaining the Cuban Missile Crisis (1971), p. 256.

Law and Logic

8. Cohen and March, Leadership and Ambiguity (1974), pp. 216-219.

9. Allison, supra note 5, p. 32.

10. See, E. Purcell, The Crisis of Democratic Theory (1976).

11. Neustadt, Presidential Power (1960), p. 33.

12. Horowitz, supra note 2, p. 8.

THE BACKGROUND, 1954-1970: CONSTITUTION AND COURT; CAMPUS AND CONGRESS

The Constitutional Principle

13. 163 U.S. 537 (1896).

14. Bakke v. The Regents of the University of California, 18 Cal. 3d 34, 132 Cal. Rept. 680, 553 P.2d 1152 (1976).; Cert. granted, 2/22/1977, U.S. ,97 S.Ct. 1098 (1977).

15. Cumming v. Richmond County Board of Education, 175 U.S. 528 (1899); Gong Lum v. Rice, 275 U.S. 78 (1927).

16. Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938); Sipuel v. Oklahoma, 332 U.S. 631 (1948); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

17. Bolling v. Sharpe, 347 U.S. 497 (1954).

18. Green v. County School Board, 391 U.S. 430 (1968).

19. Executive Order 10925, 26 Fed. Reg. 3577 (1961); Executive Order 11114, 28 Fed. Reg. 6485 (1963); Executive Order 11141, 29 Fed. Reg 2477 (1964).

20. See Vetter, "Affirmative Action in Faculty Employment Under Executive Order 11246," Report for the Administrative Conference of the United States (1974), p. 3.

The Federal Solution: Title VI of the Civil Rights Act

21. 42 U.S.C. §2000d et seq. (1964).

22. 42 U.S.C. §2000d-1 (1964).

23. H.Rep. No. 914, to accompany H.R. 7512, 1st Sess. 256, 280 (1963).

24. Mandel v. HEW, 562 F.2d 914, 923 (Case No. 76-1494) (1977).

25. See, Berger, Government by Judiciary (1977); Bickel, The Morality of Consent (1975), pp. 33-54; Kluger, Simple Justice (1975), Chapter 24.

26. 42 U.S.C. §2000d-1(2) (1964).

27 42 U.S.C. §2000d-6(c) (1964).

28. Executive Order 11764 §3, 39 Fed. Reg. 2575 (1974).

29. See, Evans and Novak, Washington Post, August 29, 1977, and September 28, 1977.

30. 45 C.F.R. §80.4(c), §181.

The View from the Campus

General background information on the history of the black colleges is found in two reports issued by the state educational system: "State Supported Traditionally Negro Colleges in North Carolina," Special Report 3-67, North Carolina Board of Higher Education (1967), hereinafter cited as "Black Colleges Report, 1967"; and "A Comparative Study of the Five Historically Black Constituent Institutions of the University of North Carolina," Board of Governors Report (1976), hereinafter cited as "Comparative Study".

31. Cohen and March, Leadership and Ambiguity (1974), pp. 37-40.

32. "Comparative Study," p. 19.

33. Ibid, p. 23.

34. See, §202B.(3), "The Code," Board of Governors, The University of North Carolina (1975) (hereinafter cited as "The Code.")

35. Biennial Report, North Carolina Board of Higher Education (1967-1969), p. 123.

36. Data supplied by Office for Civil Rights, Department of Health, Education, and Welfare, 12/15/77.

37. Black Colleges Report, 1967, p. 5.

38. Ibid., pp. 45-46.

39. Ibid., p. 61.

40. Comparative Study, p. 29.

41. Comparative Study, p. 6.

42. Black Colleges Report, 1967, p. 12.

43. Comparative Study, p. 77.

44. Ibid., at 71. Figures for one black institution are in quantiles: 52 percent of entering freshmen were in the top half of their class in that institution.

45. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

46. Davis and Borders-Patterson, "Black Students in Predominantly White North Carolina Colleges and Universities," ETS Rept.-2 (1973).

47. Ibid., pp. 9-10; See, also, Sennett and Cobb, The Hidden Injuries of Class (1973).

48. Tobias, "Government Regulation, Institutional Self-Regulation and Access to Academic Employment" (1977), Chapter in forthcoming book on government regulation of higher education, edited by Robert O. Berdahl.

49. Ibid., p. 8.

50. 414 U.S. 563 (1974).

51. Florida ex rel. Hawkins v. Board of Control, 350 U.S. 314 (1956).

THE POLITICS OF REGULATION: THE FIRST PHASE: 1964-1977

The Agency: HEW and OCR, 1964-1974

General background information for this material is contained in the several opinions of the court in Adams; and the plaintiffs' "Motion for Further Relief," Adams v. Weinberger, Civ. Action No. 3095-70, filed August 1, 1975 (hereinafter cited as "Motion for Further Relief").

52. Case note, 5 N.C.Cent. L.J. 365 (1974).

53. Heclo, A Government of Strangers: Executive Politics in Washington (1977), pp. 37, 103.

54. Fuller, The Morality of Law (1964), p. 39.

55. See, Evans and Novak, supra note 29. Enforcement of the actions by the Department of Justice against Mississippi and Louisiana have been very slow.

The Adams Suit: Phase I: 1970-1973

56. Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969).

57. Adams I at 642.

58. Adams II at 94.

59. Adams III at 1162, quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 204, 410 (1971).

60. Adams III at 1164.

The Courts and Higher Education

61. Alabama State Teachers Association v. Alabama Public School and College Authority, 289 F. Supp 784, 787-788 (M.D.Ala. 1968); aff'd per curium, 393 U.S. 400 (1969) (hereinafter cited as "ASTA").

62. Geier v. Dunn, 337 F. Supp 573, 579 (M.D.Tenn., 1972).

63. ASTA, supra note 61 at 787.

64. Sanders v. Ellington, 288 F. Supp 939 (M.D.Tenn., 1968).

65. Geier v. Blanton, 427 F. Supp 644 (M.D.Tenn., 1977).

66. Alevy v. Downstate Medical Center, 384 N.Y.S. 2d 82, 90-91 (1976). (emphasis added).

67. Lee and Bowen, Managing Multicampus Systems (1975); Lee and Bowen, The Multicampus University (1971).

68. Motion for Further Relief, p. 3.

69. Bundy, "The Issue Before the Court: Who Gets Ahead in America?" Atlantic Monthly, Vol. 240, No. 5 (November 1977), pp. 41, 46.

The Rough Shoals of Regulating

General background material: Letter of Martin Gerry to Governor Holshouser of North Carolina, July 31, 1975; Statements of President Friday to Board of Governors, April 8, 1977 and July 15, 1977; Motion for Further Relief; and Atkins v. Scott, C.A. 162-WS-70 (U.S. Dist.Ct.M.D.N.C. 1977) (hereinafter cited as "Atkins").

70. See, generally, The Code.

71. Comparative Study, p. 59.

72. Board of Governors, "Comments on the North Carolina State Plan, Phase II," (December 5, 1977) (hereinafter cited as "Board of Governors Comments"), p. 10.

73. Letter of William Thomas to President William C. Friday, March 25, 1975, p. 1.

74. Atkins, p. 15.

75. Ibid.

76. Letter of William Thomas, supra note 73, p. 2.

77. Letter of David Tatel to President Friday, November 7, 1977, with attached "Initial Comments on The Revised North Carolina State Plan for the Further Elimination of Racial Duality in Public Higher Education Systems, Phase II: 1978-1983" (hereinafter cited as "HEW Comments"), p. 7.

78. Letter of Martin Gerry to Governor Holshouser of North Carolina, July 31, 1975.

79. Paper delivered by Robert Bork at George Washington University, December 11, 1976, p. 3. In addition to the proceedings mentioned in the text, Friday was defendant in a "reverse discrimination" suit brought by students challenging the minority representation provisions of campus and certain student government organizations. See, Uzzell v. Friday, 401 F. Supp 775 (M.D.N.C., 1975); 547 F.2d 801 (CA 4, 1977); pet for cert filed 46 LW 3323 1977.

The Adams Suit: Phase II: 1975-1977

80. Motion for Further Relief, pp. 2-3.

81. Adams IV at 120.

82. Transcript of Deposition of Martin Gerry, January 17, 1977, in connection with Hearings on Motion for Further Relief in Adams v. Mathews (Adams IV). The transcript is 33 pages long.

83. Adams IV at 120.

84. Ibid.

THE POLITICS OF REGULATION: THE SECOND PHASE: 1977-1978

HEW: The Process of Shaping Policy

85. This panel contained several of the leading figures in post-secondary education, including Harold Howe, Eldridge McMillan, Norman C. Francis, Sheldon Steinbach, Blenda Wilson, and Lisle Carter, among others. Views of this meeting were gathered from discussions with several of the participants, and review of a copy of a letter from Eldridge McMillan, Associate Director of the Southern Education Foundation to Secretary Joseph Califano, dated June 3, 1977, in which McMillan stated his concern about the "tone" of the June 1 meeting.

The Substantive Standard of Elimination of Duality

86. Data supplied by Office for Civil Rights, Department of Health, Education, and Welfare, 12/15/77.

Theory and Practice

87. Statement of HEW Secretary Joseph Califano, Jr., Press Release, July 5, 1977.

87a. Dentler, "Improving Public Education: The Boston School Desegregation Case;" The Advocate, Suffolk University Law School (1975).

88. Califano Press Release, supra note 87.

The Points of Difference: HEW and North Carolina

89. HEW Comments, p. 11.

90. Ibid., p. 12.

91. Letter of David Tatel to Congressman L. H. Fountain, December 5, 1977, p. 3.

92. Ibid.

93. Response to The Revised North Carolina State Plan for the Further Elimination of Racial Duality in Public Higher Education Systems, Phase II: 1978-1983 of North Carolina Alumni and Friends Coalition, December 22, 1977, p. 17.

94. Board of Governors Comments, p. 14.

CONCLUDING REMARKS

95. Lee and Bowen, Managing a Multicampus University, p. 93.

96. In Lau v. Nichols, supra note 50, the Supreme Court acknowledged that a class-group had standing to bring a private right of action under Title VI.

97. Davis, Administrative Law of the Seventies (1976), Supp. to Administrative Law Treatise, pp. 653-654.

98. Lipsett and Riesman, Education and Politics at Harvard (1977); Jencks and Riesman, The Academic Revolution (1969).

APPENDICES

ELEMENTS OF A PLAN

I. DISESTABLISHMENT OF THE STRUCTURE OF THE DUAL SYSTEM

An acceptable plan shall commit the state to the goal of organizing and operating the system and institutions of higher education in a manner that promises realistically to overcome the effects of past discrimination and to disestablish the dual system and which assures that students will be attracted to each institution on the oasis of educational programs and opportunities uninhibited by past practices of segregation.

To achieve the disestablishment of the structure of the dual system, each plan shall:

A. Define the mission of each institution within the state system on a basis other than race.

Each mission statement shall include at a minimum:

1. the level, range and scope of programs and degrees offered;
2. geographic area served by the institution; and
3. the projected size of the student body and staff.

B. Specify steps to be taken to strengthen the role of traditionally black institutions in the state system.

The plan shall include:

1. commitments that traditionally black institutions will have the facilities, quality and range of

programs, degree offerings, faculties, student assistance, and other resources which are at least comparable to those at traditionally white institutions having similar missions;

2. commitments that necessary improvements will be made to permit these institutions to fulfill their defined missions;
3. commitments by the state system for the improvement and expansion of resources, (e.g., physical plant, program offerings, research equipment, financial support, student, faculty and professional staff services) at the traditionally black institutions in accordance with their missions;
4. an assessment of the physical plant at traditionally black institutions; and
5. a detailed description of the resources, expressed in dollars and in numbers of personnel to be assigned, which the state system will provide (and the source for such funds) in order to implement these measures in I.B., reported by year for the life of the measure or activity.

C. Commit the state to take specific steps to eliminate educationally unnecessary program duplication among traditionally black and traditionally white institutions in the same service area.

The plan shall identify existing degree programs, major fields of study, and course duplication (other than core curricula) among institutions having identical or overlapping service areas and indicate specifically with respect to each area what steps the state will take to eliminate such duplication. The elimination of such program duplication shall be carried out consistent with the objective of strengthening the traditionally black colleges.

D. Commit the state to give priority consideration to placing any new undergraduate, graduate, or professional degree programs, courses of study, etc., which may be proposed, at traditionally black institutions, consistent with their missions.

E. Commit the state to withhold approval of any changes in the operation of the state system or of any institutions that may have the effect of thwarting the achievement of its desegregation goals.

F. Commit the state to ~~submit proposals for any major change in the operations of the state system which may directly or indirectly affect or impede the achievement of its desegregation goals to OCR for review 90 days prior to their adoption.~~ *advise OCR of proposed major changes in the mission or the character of any institution within the state system which may directly or indirectly affect the achievement of its desegregation goals prior to their formal adoption.*

Such proposed changes include but are not limited to ~~major physical construction projects or renovations; the establishment of new programs of study or departments; the alteration of two year institutions to four year institutions, or the closing or merger of institutions or campuses.~~ *the establishment or major expansion of new programs of study, of departments, or institutions, the alteration of two year to four year institutions; the conversion of a private to a public institution; or the closing or merger of institutions or campuses.*

~~If OCR disapproves such proposed changes, it will do so within 90 days of their submission.~~

G. Specify timetables for sequential implementation of the actions necessary to achieve these goals as soon as possible but no later than within five years (by the close of the academic year 1981-82), unless compelling justification for a longer period for compliance is provided to and accepted by the Department.

The plan shall include interim benchmarks and goals from which progress toward these objectives may be measured. These

timetables and benchmarks shall be appropriate to the nature of the action to be taken. For example, studies of physical plant and resources comparability should be completed promptly; corrective actions (including capital construction) will require longer time periods.

H. Commit the state and all its involved agencies and subdivisions to specific measures for achievement of the above objectives.

Such measures may include but are not limited to establishing cooperative programs consistent with institutional missions; reassigning specified programs, course offerings, resources and/or services among institutions; realigning the land grant academic programs so that research, experiment and other educational services are redistributed on a nonracial basis; and merging institutions or branches thereof, particularly where institutions or campuses have the same or overlapping service areas. The measures taken pursuant to this section should be consistent with the objective of strengthening the traditionally black colleges. A description of these measures need not be submitted at the time the plan is filed, but should be filed as a supplementary statement within 30 days thereafter for review and comment by OCR. Measures that offer no reasonable possibility of achieving the goals listed above will be rejected by OCR. Revised measures will be required before the plan can be accepted.

II. DESEGREGATION OF STUDENT ENROLLMENT

An acceptable plan shall commit the state to the goal of assuring that the system as a whole and each institution within the system provide an equal educational opportunity, are open and accessible to all students, and operate without regard to race and on a desegregated basis.

To achieve the desegregation of student enrollment, each plan shall:

A. Adopt the goal that for two year and four year undergraduate public higher education institutions in the state system, taken as a whole, the proportion of black high school graduates throughout the state who enter such institutions shall be at least equal to the proportion of white high school graduates throughout the state who enter such institutions.

B. (1) Adopt the goal that there shall be an annual increase, to be specified by each state system, in the (enrollment) *proportion* of black students in the traditionally white four year undergraduate public higher education institutions in the state system taken as a whole and in each such institution; and

(2) Adopt the objective of reducing the disparity between the proportion of black high school

graduates and the proportion of white high school graduates entering 8/ *(added)* traditionally white four year *and upper division undergraduate public higher* ~~undergraduate public higher education~~ *education institutions in the state system;* ~~institutions in the state system;~~ and adopt the goal of reducing the current disparity by at least fifty per cent by the academic year 1982-83. However, this shall not require any state to increase by that date black student admissions by more than 150% above the admissions for the academic year of 1976-77. 8/ *(now 9/)*

C. Adopt the goal that the proportion of black state residents who graduate from undergraduate institutions in the state system and enter graduate study or professional schools in the state system shall be at least equal to the proportion of white state residents who graduate from undergraduate institutions in the state system and enter such schools.

This goal (and interim benchmarks or goals) shall be separately stated for each major area of graduate and

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7 9/

~~8/~~ Thus, where the present entry by black students in four year traditionally white institutions is at a rate of 1000 students per year and a fully proportional rate would be 3000 students per year, the state's goal would be an entry rate of 2000 students per year by 1982-83. A state where the present entry is at a rate of only 500 students per year and full proportionality would be 3000 students per year would not by that date have to close half the gap (by a rate of 1750 per year) but only achieve an entry rate of 1250 students, which is 150% over its present rate of 500.

8/ *For the purposes of this subsection, the term entering includes first-time transfers from two year and other institutions.*

professional study. To assure that this goal can be met in the immediate future special recruitment efforts should be considered at traditionally black institutions. Particular attention should be given to increasing black student enrollment and graduation from those traditionally white four year undergraduate institutions which serve as the feeder institutions for the graduate and professional schools. Achievement of this goal is of particular importance in light of the specific concern expressed by the Court of Appeals in Adams. In assessing progress toward this goal, OCR will give consideration to the number of blacks *from each state who enroll* ~~who enroll in graduate and~~ *in graduate and professional schools outside the state system.* ~~professional schools outside the state system.~~

D. Adopt the goal of increasing the total number of white students attending traditionally black institutions.

Increased participation by white students at traditionally black institutions must be a part of the process of desegregation of the statewide system of higher education. However, pursuant to the admonition of the courts in Adams, "The desegregation process should take into account the unequal status of the Black colleges and the real danger that desegregation will diminish higher education opportunities for Blacks." Civil Action No. 3095-70, Second Supplemental Order at p. 4. The following steps are designed to guard against the diminution of higher educational opportunities for black students, to take into account the unique importance of *traditionally black* ~~Black~~ colleges and to comply with the mandate of Title VI. Establishment of numerical goals for the enrollment of white students at *traditionally* ~~black~~ institutions must be preceded by an increasing

enrollment of black students in the higher education system and at the traditionally white institutions, as is required by Section II of these criteria. It must also be preceded by the accomplishment of specific steps to strengthen the role of traditionally black institutions, eliminate program duplication, locate new programs at black institutions, and by such other measures as are set forth in Section I.

OCR shall annually review the progress made by each state in increasing participation by black students in higher education and in the disestablishment of the dual school system. Commencing on September 1, 1979, and consistent with such progress, each state system shall specify annual numerical goals for increasing the participation of white students attending the traditionally black institutions.

E. Commit the state to take all reasonable steps to reduce any disparity between the proportion of black and white students completing and graduating from the two year, four year and graduate public institutions of higher education, and establish interim goals, to be specified by the state system, for achieving annual progress.

F. Commit the state to expand mobility between two year and four year institutions as a means of meeting the goals set forth in these criteria.

G. Specify timetables for sequential implementation of actions necessary to achieve these goals as soon

as possible but not later than within five years (by the close of the academic year 1981-82) unless another date is specified in this section.

H. Commit the state and all its involved agencies and subdivisions to specific measures to achieve these goals.

Such measures may include, but are not limited to reviewing, monitoring, and revising, as necessary, procedures for student recruitment, admissions, compensatory instruction, counseling, financial aid, and staff and faculty development programs. A description of these measures need not be submitted at the time the plan is filed, but should be filed as a supplementary statement within 30 days thereafter for review and comment by OCR. Measures that offer no reasonable possibility of achieving the numerical goals will be rejected by OCR. Revised measures will be required before the plan can be accepted.

III. DESEGREGATION OF FACULTY, ADMINISTRATIVE STAFFS, NON-ACADEMIC PERSONNEL, AND GOVERNING BOARDS

An acceptable plan shall commit the state system to the goal of increasing the number and proportion of black employees, academic and non-academic, throughout the system and of increasing representation of black citizens among appointive positions on the governing boards of the state system and of individual institutions.

To achieve the desegregation of faculty, administrators, other personnel, and governing boards, each plan shall:

A. Adopt the goal that the proportion of black faculty and of administrators at each institution and on the staffs of each governing board, or any other state higher education entity, in positions not requiring the doctoral degree, shall at least equal the proportion of black students graduating with masters degrees from institutions within the state system, or the proportion of black individuals with the required credentials for such positions in the relevant labor market area, whichever is greater.

B. Adopt the goal that the proportion of black faculty and of administrators at each institution and on the staffs of each governing board or any other state higher education entity, in positions requiring the doctoral

degree, shall at least equal the proportion of black individuals with the credentials required for such positions in the relevant labor market area.

C. Adopt the goal that the proportion of black non-academic personnel (by job category) at each institution and on the staffs of each governing board or any other state higher education entity, shall at least equal the proportion of black persons in the relevant labor market area.

D. Assure hereafter and until the foregoing goals are met that for the traditionally white institutions as a whole, the proportion of blacks hired to fill faculty and administrative vacancies shall not be less than the proportion of black individuals with the credentials required for such positions in the relevant labor market area.

E. Specify timetables for sequential implementation of the actions necessary to achieve this objective including interim benchmarks and goals from which progress toward the objective may be measured.

These timetables, interim goals and benchmarks shall be established in light of, and shall specify, the current and projected rates of vacancies in the various job categories, present and projected labor market availability, and other relevant factors.

F. Commit the state system to taking specific measures to achieve these objectives.

Such measures may include, but are not limited to employment programs providing centralized recruitment, vacancy, and applicant listings; transfer options; faculty development programs permitting release time for black faculty to attain the terminal degree; and the interchange of faculty on a temporary or permanent basis among traditionally white and traditionally black institutions within the state system. A description of these measures need not be submitted at the time the plan is filed, but should be filed as a supplementary statement within 30 days thereafter for review and comment by OCR. Measures that offer no reasonable possibility of achieving the goals listed above will be rejected by OCR. Revised measures will be required before the plan can be accepted.

C. Adopt the goal of increasing the numbers of black persons appointed to systemwide and institutional governing boards and agencies so that these boards may be more representative of the racial population of the state or of the area served.

IV. SUBMISSION OF PLANS AND MONITORING

A. The states of Arkansas, Florida, Georgia, North Carolina, Oklahoma, and Virginia shall within 60 days of receipt of these criteria submit to OCR a desegregation plan for each of their systems of public higher education to implement the foregoing criteria.

1. Each plan shall commit the state to substantial progress toward each of the goals in the first two years of the plan.

2. Each plan shall be signed by the governor and by each official or designated person representing the agencies, associations, commissions, offices, and/or institutions responsible for adopting the systemwide and institutional goals described therein. Such persons or entities must be authorized under state law to perform all actions necessary to achieve these goals.

3. Each plan shall certify that achievement of the goals and interim benchmarks specified therein has been adopted as official policy of each official or agency.

B. OCR shall notify each state of acceptance or rejection of the plan within 120 days of its receipt.

C. It is recommended that each state establish a biracial citizens advisory/monitoring committee to assist the state in monitoring the implementation of the plan.

D. Beginning in August 1978, each state shall submit to OCR by August 15 of each year a comprehensive narrative assessment of its desegregation efforts in the most recent academic year. This narrative assessment shall include:

1. a description of the specific measures which have been taken to achieve the objectives enumerated in the plan and in the criteria;
2. a description of the results achieved, including quantitative indices where appropriate or required;
3. an analysis of the reasons why any steps taken proved inadequate or insufficient; and
4. a description of the steps the state will take to achieve progress and to maintain the timetables set forth in the plan.

E. OCR shall review such narrative reports. If good cause for the failure to meet interim goals is not demonstrated, OCR may impose more stringent requirements, including advance approval by OCR

of desegregation methods, in order to assure achievement of the goals of the plan. In the alternative, the Department may initiate enforcement proceedings under Title VI of the Civil Rights Act of 1964, if compliance with Title VI cannot be achieved by voluntary means.

F. Each plan shall provide that the state will furnish to OCR statistical reports, assessments, and such other information as OCR may deem necessary from time to time in order to determine the effectiveness of the state's efforts to achieve the goals described in these criteria. Such information shall include annual statistical reports in substantially the same format used previously by the affected states pursuant to earlier desegregation plans. Specific dates for the submission of the reports will be established by OCR. In the event that subsequent developments call for the submission of additional data, such requirements will be announced after consultation with the states, and the states and institutions shall have sufficient time to develop the system needed for the gathering of additional data.

V. DEFINITIONS

As used in these criteria:

A. "Department" refers to the U. S. Department of Health, Education, and Welfare. In instances where the "Department" is to take certain actions, they may be performed by the Office for Civil Rights or the Director, Office for Civil Rights, on behalf of the Department.

B. "Institution" means any school, college, junior or community college, university, professional or graduate school, administered by or as an agency of the state government. Four year institution means any school, college, or university that offers a baccalaureate or graduate degree. For the purposes of these criteria, "institution" does not refer to private schools or colleges.

C. "State system" means the aggregate of all state public institutions of higher education within the state, whether or not under the goverance of the same state agency or board.

D. "Student" means any person enrolled in an instructional program, whether full-time or part-time, ~~and whether enrolled for credit or not, at any campus of any institution.~~ *subject to exceptions to be specified by the Office For Civil Rights.*

E. "Faculty" means all persons employed by an institution as *full-time* instructional personnel ~~full-time or part-time~~.

F. "Labor market area" means the geographical area in which an institution or campus traditionally recruits or draws applicants possessing the requisite credentials for vacancies in faculty, administrative, or non-academic personnel positions.

G. "Governing board" means that appointed or elected body, whether or not responsible to the governor of a state or to the state legislature, which is charged under state law with the ultimate responsibility for the administration and operation of institutions within the state system of public higher education. A "governing board" may be responsible for the entire system, for a single campus or institution thereof, or for a specified group of campuses or institutions.

Appendix B

Secretaries of Department of Health, Education and Welfare

1964-65	Anthony J. Celebrezze
1966-67	John W. Gardner
1968	Wilbur J. Cohen
1969	Robert H. Finch
1970-72	Elliot L. Richardson
1973-75	Casper W. Weinberger
1976	David Mathews
1977	Joseph A. Califano, Jr.

General Counsel, Department of Health, Education, and Welfare

1964-68	Alanson W. Willcox
1969-70	Robert C. Mardian
1971-73	Wilmot R. Hastings
1974-75	John B. Rhinelander
1976	William H. Taft
1977	F. Peter Libassi

Assistant General Counsel, Department of Health, Education, and Welfare

1968	Vacancy (no such office prior to this year)
1969-70	Edwin H. Yourman
1971	Vacancy
1972-75	Theodore A. Miles
1976-77	Peter Bouxsein

Director, Office for Civil Rights

1968	Ruby G. Martin
1969	Leon Panetta
1970-72	J. Stanley Pottinger
1973-75	Peter E. Holmes
1976	Martin Gerry
1977	David Tatel

TABLE 1

BLACK PARTICIPATION IN PUBLIC HIGHER EDUCATION

FOR THE STATE OF NORTH CAROLINA

ACCESS TO HIGHER EDUCATION IN 1976

Institutions	Undergraduate[1]					
	Within State 1976 High School Graduates		Within State First-Time Entering Undergraduates, 1976			
	Black Number	White Number	Black Number	Black Percent	White Number	White Percent
1. Statewide	19599	52648	12308	62.8	39525	75.1
2. Traditionally Black Institution(s)			2794	14.3	58	0.1
3. Flagship Institution			179	.9	2188	4.2
4. Other Four-Year Traditionally White Institutions			587	3.0	9582	18.2
5. Two-Year Institutions			8748	44.6	27697	52.6
6. All Traditionally White Institutions			9514	48.5	39467	75.0

[1]Undergraduate access means the percentage (by race) of high school graduates going on to public higher education.

TABLE 2

PERCENTAGE RACIAL COMPOSITION
OF FOUR-YEAR PUBLIC INSTITUTIONS
IN NORTH CAROLINA BASED ON
TOTAL HEADCOUNT ENROLLMENT IN 1976

Traditionally White Four-Year Institutions	Percentage of Majority Race
N. C. School of the Arts	89.6%
Pembroke	90.9%
UNC - Greensboro	92.3%
UNC - Charlotte	92.5%
UNC - Chapel Hill	93.7%
East Carolina	94.0%
UNC - Wilmington	94.6%
N.C. State University	95.5%
UNC - Asheville	96.3%
Western Carolina	96.9%
Appalachian	97.5%

Traditionally Black Four-Year Institutions	Percentage of Majority Race
Fayetteville	94.0%
N.C. A & T	91.6%
Elizabeth City	91.2%
Winston-Salem	91.0%
N.C. Central	90.5%

Source: Statistical Abstract of Higher Education in North Carolina, 1976-1977, Table 28, p. 48. UNC - Chapel Hill, 1977.

TABLE 3

BLACK STUDENTS AS PERCENTAGE OF
TOTAL ENROLLMENT IN TRADITIONALLY
WHITE INSTITUTIONS
IN NORTH CAROLINA

1963	1964	1965	1966	1967	1970	1973	1974	1976
.6%	1.0%	1.1%	1.4%	1.7%	1.9%	3.7%	4.3%	5.6%

WHITE STUDENTS AS PERCENTAGE
OF TOTAL ENROLLMENT IN TRADITIONALLY
BLACK INSTITUTIONS
IN NORTH CAROLINA

1963	1964	1965	1966	1967	1970	1973	1974	1976
.1%	.1%	.3%	.3%	.9%	1.5%	5.6%	4.5%	8.5%

Sources: Biennial Report, 1967-69, North Carolina Board of Higher Education, p. 123;
Revised N. Carolina State Plan: Phase II; 1977, p. 105,
HEW-OCR, Data enclosed in letter of December 15, 1977.

TABLE 4

AVERAGE ANNUAL GROWTH IN BLACK FTE ENROLLMENT
IN SELECTED "FLAGSHIP" INSTITUTIONS
IN THE SIX ADAMS STATES

	N.C.	FLA.	ARK.	OK.	GA.	VA.
1970-74	35.6	33.7	-27.3	3.2	39.7	11.1
1974-76	-0.6	11.8	243.6	9.4	9.1	48.4

AVERAGE ANNUAL GROWTH IN BLACK ENROLLMENT
IN "OTHER 4-YR. TWI'S"
IN THE SIX ADAMS STATES

	N.C.	FLA.	ARK.	OK.	GA.	VA.
1970-74	24.9	31.1	15.2	1.5	16.6	22.6
1974-76	23.9	17.7	21.2	14.9	34.0	18.6

TABLE 5

BLACK ENROLLMENT AT SELECTED
"FLAGSHIP" INSTITUTIONS
(Full-Time Undergraduates Only)

	1972		1974	
	#	%	#	%
U. of Texas, Austin	241	0.8	391	1.3
U of S. Carolina, main campus	527	4.3	735	6.2
U. of California, Berkeley	706	3.9	771	4.0
U. of Indiana, Bloomington	931	4.4	889	4.3
U. of Illinois, Champaign-Urbana	1063	4.4	816	3.3
Ohio State U., main campus	1537	4.5	1941	5.7

APPENDIX

Introduction

The following summary sketches the anti-discrimination/ affirmative action laws which apply generally to higher education. Most provisions apply to many activities and institutions other than those in education, and this general application is noted. Provisions of specific laws incorporated in particular aid programs (e.g. Sections 799A and 845 of the Public Health Service Act prohibiting sex discrimination in schools assisted under the Act) have not been included in this chart.

A poster entitled "Federal Laws and Regulations Concerning Sex Discrimination in Educational Institutions" published by the Project on the Status and Education of Women of the Association of American Colleges was used in preparing portions of the following chart.

Abbreviations

A & TBCB - Architectural & Transportation Barriers Compliance Board
C.F.R. - Code of Federal Regulations
DOJ - Department of Justice
DOL - Department of Labor
EEOC - Equal Employment Opportunity Commission
F.R. - Federal Register
HEW - Department of Health, Education, and Welfare
OCR - Office for Civil Rights (HEW)
OFCC - Office of Federal Contract Compliance (DOL)
U.S. - United States Reports - Supreme Court opinions
U.S.C. - United States Code

NAME	SUBSTANTIVE PROVISIONS	ENFORCEMENT
Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) Applies To: The programs and activities of *all* agencies and *institutions receiving federal financial assistance* (including contracts, grants, or loans). Effective: July 2, 1964 Admin. Agency: Each agency or department empowered to grant federal financial assistance. *For education, all enforcement* powers have been *delegated* to *HEW (OCR).* Regulations: 45 C.F.R. 80	*Prohibits discrimination* (including: denial or differential provisions of aid, benefits, or services; and segregation or separate treatment relating to the receipt of services, financial aid or other benefits) *against program participants* on the basis of *race, color,* and *national origin.* NOTE: Although Title VI explictly excludes general employment practices from its scope, HEW (45 C.F.R. 80, 3(c)) applies Title VI requirements to employment practices *where employment is the primary purpose* of assistance or discrimination in employment tends to result in discrimination in the program itself.	General Compliance: Assurance of non-discrimination required concurrently with application for assistance. Absent specific complaints, OCR conducts general compliance reviews periodically. Individual Complaints: Within 180 days of violation, an individual or class complaint should be filed with OCR. After notice, investigation, findings, and attempts at voluntary compliance, OCR may move to terminate federal financial assistance and deny future assistance or refer to the Department of Justice for court action. Termination of federal assistance may only become effective 30 days after notice to appropriate Congressional committees. Sanctions: Termination of federal assistance, primarily. Injunctions and other remedies may be issued only pursuant to litigation following referral to DOJ.

Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e) Applies To: *All* employers with 15 or more employees. NOTE: Professional employees of educational institutions were exempted from the Act under its original provisions. This exemption was eliminated as of March 24, 1972 by the Equal Employment Opportunity Act of 1972. Effective: July 2, 1965, in general and for non-professional employees of educational institutions. March 24, 1972, for professional employees of educational institutions. Admin. Agency: Equal Employment Opportunity Commission (within the Department of Labor). Regulations: 29 C.F.R. 1600	Prohibits *discrimination in employment* (including hiring, upgrading, salaries, fringe benefits, training, and other conditions of employment) on the basis of *race, color, religion, national origin,* or *sex.*	General Compliance: No general compliance reviews, per se. Investigation only upon complaint, but once complaint made, EEOC may investigate entire institution. Also, a commissioner may make a complaint on behalf of others. Individual Complaints: Within 180 days of alleged discriminatory act, individuals, organizations on their behalf, or commissioners may file a complaint. EEOC must notify persons or organizations against whom charges have been filed within 10 days. Following investigation, letters of findings are sent to complainant and employer. If voluntary settlement attempts fail, EEOC, Attorney General, or aggrieved individuals may sue. Sanctions: Following a successful suit, a court may enjoin the employer from engaging in unlawful acts, order appropriate affirmative or remedial action, reinstate employee, and award back pay and attorney's fees.

NAME	SUBSTANTIVE PROVISIONS	ENFORCEMENT
Executive Order 11246, as amended by Executive Order 11375 (30 F.R. 12319 as amended by 32 F.R. 14303) Applies To: All federal contractors with *more than $50,000* in federal contracts *and 50 or more employees* are required to submit *written affirmative action plans.* Effective: October 24, 1965, generally; October 13, 1967 for sex discrimination Admin. Agency: Office of Federal Contract Compliance (DOL) *and particular "contracting agencies" like HEW-OCR.* Regulations: 41 C.F.R. 1-12.8; 41 C.F.R. 60; 45 C.F.R. 82	*Prohibits discrimination* in *employment* (including hiring, upgrading, salaries, fringe benefits, training and other conditions of employment) on the basis of *race, color, religion, national origin* or *sex* (sex by Ex. Or. 11375); and *requires* by contract provision, that employers will take *affirmative action* against such discrimination.	General Compliance: Pre-award reviews are required for contracts over $1 million. Periodic reviews are undertaken of all contractors subject to the Order's provision. Individual Complaints: Individual complaints are referred to EEOC for proceedings under Title VII of the Civil Rights Act. Class or pattern complaints are investigated, followed by efforts at voluntary compliance. Proceedings to suspend or terminate federal contracts and prevent future awards may follow. Referral can be made to DOJ for court action. Sanctions: Termination of present contracts and bar to future contracts are primary sanctions. Injunctions and other remedies may follow EEOC proceeding or court action by DOJ.
Title IX of Education Amendments of 1972, as amended (20 U.S.C. 1681-1686)	Prohibits discrimination on the basis of *sex* or *blindness*, including:	General Compliance: Periodic compliance reviews are made in the absence of a complaint.

Applies To: Educational agencies and institutions receiving federal financial assistance.

Major exception: *Private undergraduate institutions*, elementary and secondary schools (other than vocational schools), *and single-sex public undergraduate institutions* are exempted *for admissions purposes only.*

Effective: July 1, 1972

Admin. Agency: Each department which is empowered to extend federal financial assistance to educational institutions. *In practice, all enforcement powers probably will be delegated to HEW-OCR.*

Regulations: 45 C.F.R. 86

- admissions and recruitment of students;
- denial or differential provision of any aid, benefits, or services of any academic, extracurricular, research, occupational training, or other educational program or activity;
- financial aid or other benefits

Although modeled after Title VI of the Civil Rights Act, Title IX has *no general exemption for employment practices,* an exemption which Title VI contains. Hence, *HEW has applied Title IX* to *employment practices,* also. A federal district court in Michigan has *rejected* this interpretation. See Romeo Community Schools v. HEW, 45 U.S. Law Week 2509.

Individual Complaints: Individual or class complaints should be filed within 180 days. Following notification, investigation, findings, and attempts at voluntary compliance, HEW may move to terminate federal assistance or refer to Department of Justice for court action. No termination shall become effective until 30 days after notification to the appropriate Congressional committees.

Sanctions: Primarily, the termination of federal funds. If referred to DOJ for court action, a judge may order general equitable remedies.

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Equal Pay Act of 1963, as amended (29 U.S.C. 206 (d)).

Applies To: All employers covered by Fair Labor Standards Act of 1938 (minimum wage law).

NOTE: Although National League of Cities v. Usery, 426 U.S. 833, exempts public institutions from FLSA, it has *not* been interpreted to *exempt public institutions* from the *Equal Pay Act.*

Prohibits *discrimination in salaries* (including almost all fringe benefits) for equal work on the basis of *sex.*

General Compliance: Reviews without complaints are conducted, and institutions will often not be told if there has or has not been a specific complaint.

Individual Complaints: No formal procedure has been established for handling particular complaints. Individual or class complaints

NAME	SUBSTANTIVE PROVISIONS	ENFORCEMENT
Equal Pay Act of 1963, continued Effective: June 10, 1964 for non-professional employees. July 1, 1972 for professional employees. Admin. Agency: Wage and Hour Division (DOL) Regulations: 29 C.F.R. 800		are investigated and, in 95% of the cases, resolved voluntarily. If not resolved, either individual or Secretary of Labor may bring suit. NOTE: Because of high degree of voluntary compliance, there is little backlog and complaints are handled quickly. Sanctions: Fines and imprisonment (after second willful violation) following criminal prosecution. Back pay and other equitable remedies following civil suit.
Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. 621-634) Applies To: All employers, affecting interstate commerce, who have more than 20 employees. NOTE: Originally only applicable to private sector employers (including private colleges), in *1974 it was amended* to *include public sector employers* and public *higher education.*	Prohibits *discrimination in employment* (including hiring, upgrading, salaries, fringe benefits, and other conditions of employment) against *persons 40-65 years old.* NOTE: National League of Cities v. Usery, 426 U.S. 833, has been construed as *not* affecting *age discrimination enforcement* against *public employers.*	General Compliance: General compliance reviews permissible. Individual Complaints: Individual and class complaints (to be made within 180 days) are investigated and attempts at voluntary compliance are made before Secretary of Labor or individual may bring suit. Individual must give Secretary notice of intent to sue.

Effective: June 12, 1968 generally, including private college employees. May 1, 1974 for public employees (e.g. state college employees). Admin. Agency: Wage and Hour Division (DOL) Regulations: 29 C.F.R. 850 & 860		Sanctions: Fines and imprisonment (after second willful violation) possible following criminal prosecution. Back pay and general equitable remedies available following civil suit.
Age Discrimination Act of 1975 (42 U.S.C. 6101-6107) Applies To: The programs and activities of *all* agencies and *institutions receiving federal financial assistance.* Effective: Enacted on November 28, 1975, its provisions will not be effective until *January 1, 1979.* Admin. Agency: HEW Regulations: None yet	Prohibits discrimination solely on the basis of age by any program or activity receiving federal financial assistance. NOTE: Like Title IX and Section 504, the provisions of this Act parallel the provisions of Title VI of the Civil Rights Act with the exception that Title VI exempted general employment practices from its coverage whereas Title IX, Section 504, and this Act do not.	To await regulations. However, 42 U.S.C. 6104(e) makes administrative remedies (subject to judicial review) the sole enforcement mechanism under the Act. Termination of federal assistance is the primary sanction.
Architectural Barriers Act of 1968 (42 U.S.C. 4151-4157) and Section 502 of the Rehabilitation Act of 1973 (29 U.S.C. 792).	Subjects buildings and facilities to standards of design, construction and alteration that *ensure* whenever possible that *physically handicapped persons* will have *ready access to, and use of,* these *buildings.*	General Compliance: Prior to approval of assistance for the project in question, the standards must be incorporated into the plans for the facility. Subsequent

NAME	SUBSTANTIVE PROVISIONS	ENFORCEMENT
Architectural Barriers Act of 1968 and Section 502 of the Rehabilitation Act of 1973, cont. Applies To: Buildings and *facilities financed* in whole or in part *by federal grants or loans.* Effective: August 12, 1968 Admin. Agency: General Services Administration; Office of Education (HEW); Architectural & Transportation Barriers Compliance Board Regulations: 41 C.F.R. 101-19.6 45 C.F.R. 100a.189 & 100b.189 41 F.R. 55441, to be included in 36 C.F.R. 1150	Section 502 of the Rehabilitation Act of 1973 created the A&TBCB to "insure compliance with the standards prescribed."	investigations are undertaken to ensure compliance. Noncompliance is adjudicated by the A&TBCB. Individual Complaints: Any individual may complain that a building is not in compliance, but he or she does not thereby become a party to any hearing. Sanctions: A&TBCB may order termination of funds with respect to non-complying building.
Section 503 of the Rehabilitation Act of 1973 (29 U.S.C. 793) Applies To: *All federal contractors* with a contract in excess of $2500. Those *contractors* with *contracts* in *excess* of *$50,000* and *employing 50* or more *employees* must have a *written affirmative action plan.* Effective: September 26, 1973	Federal contractors must take *affirmative action* to *employ and advance* in employment *qualified handicapped individuals* (i.e., persons who have "a physical or mental impairment which substantially limits one or more of (their) major life activities, (have) a record of such impairment, or (are) regarded as having such an impairment"). This requirement is included in all applicable contracts.	General Compliance: Written affirmative action plans are subject to yearly review. Individual Complaints: Complaints should be filed with OFCC by individuals within 180 days of alleged violation. Either OFCC or contracting agency (at direction of OFCC) will investigate and, if violation found, will seek compliance through voluntary

Admin. Agency: Office of Federal Contract Compliance (DOL) and particular "contracting agencies" like HEW-OCR

Regulations: 41 C.F.R. 60-741

means. If not resolved, formal hearings are to be instituted.

OFCC Director, in his discretion, may take the noncomplying contractor to court rather than terminating the contract itself.

Sanctions: Withholding progress payments, termination of the contract, and debarment from future contracts may be ordered. As noted above, OFCC may seek court injunction rather then terminating the contract.

Section 504 of Rehabilitation Act of 1973 (29 U.S.C. 794)

Applies To: *All* agencies and *institutions receiving federal financial assistance* and each program or activity that receives or benefits from such assistance.

Effective: September 26, 1973

(But, in practice, not effective until promulgation of HEW regulations, which were issued on April 28, 1977 and made effective June 3, 1977.)

Prohibits *discrimination* solely on the basis of *physical or mental handicap* by any program or activity receiving federal financial assistance. Using the same definition of "handicapped individual" noted above in discussion of Section 503, HEW has interpreted this provision to *include* both program participants (or potential participants) and employees of the program. "Qualified" has 2 pertinent definitions:

1) For post-secondary program participants, it is defined as "a handicapped person who *meets the*

HEW states only that enforcement will be the same as for Title VI of the Civil Rights Act. (See 42 F.R. 22685, to be included at 45 C.F.R. 84.61)

NOTE: HEW has yet to issue general guidelines to be followed by all other departments and agencies in implementing Section 504 pursuant to Executive Order 11914.

NAME	SUBSTANTIVE PROVISIONS	ENFORCEMENT
Section 504 of Rehabilitation Act of 1973, continued Admin. Agency: *Each department* or agency granting federal assistance, subject to general standards to be issued by HEW. *In effect, HEW-OCR coordinates for all higher educational institutions.* Regulations: 42 F.R. 22675, to be included in 45 C.F.R. 84	*academic and technical standards requisite to admission* or *participation*;" 2) For employment purposes, it is defined as "a *handicapped person* who, *with reasonable accomodation, can perform* the *essential functions* of the job in question."	

The following people were interviewed in connection with this case study:

Department of Health, Education, and Welfare

- F. Peter Libassi, Esq. - General Counsel

Office for Civil Rights

- David Tatel, Esq. - Director
- Burton Taylor - Special Assistant to the Deputy Director
- William Thomas - Director, Region IV
- Martin Gerry, Esq. - former Director of OCR

- Dr. Mary Berry - Assistant Secretary for Education
- Melvin Hollis - Assistant to the Assistant Secretary for Education
- Arline Mendelson, Esq.
- Dr. David Breneman - former Deputy to the Assistant Secretary for Education

University of North Carolina

Board of Governors

- William A. Johnson, Esq. - Chairman
- George Watts Hill
- J. J. Sansom, Jr.
- General meeting with Educational Planning, Policies and Programs Committee of the Board of Governors, Dr. Hugh Daniel, Jr. - Chairman

- William C. Friday - President
- Dr. Raymond H. Dawson - Vice President for Academic Affairs
- L. Felix Joyner - Vice President for Finance
- Dr. Arnold K. King - Assistant to the President
- Jeffrey Orleans, Esq. - Staff, President's Office
- Richard H. Robinson, Jr., Esq. - Assistant to the President
- John Sanders, Esq. - Vice President for Planning
- Dr. Cleon Thompson - Vice President for Student Services and Special Programs

University of North Carolina, Chapel Hill Campus

- Dean John C. Morrow III - Provost
- Richard G. Cashwell - Director of Admissions
- Dean George Holcolm - Research Administration
- Douglass Hunt - Vice Chancellor for Administration
- Barbara Kramer
- Sarah Ramsey, Esq.
- Frederic W. Schroeder, Jr. - Assistant Dean
- Clarence N. Stover, Jr. - Associate Dean, School of Medicine
- Professor Daniel Textoris
- Harold Wallace - Assistant Dean
- Five students from student government at UNC-Chapel Hill

Representatives of Other UNC Campuses

- Dr, Joab Thomas - Chancellor
  North Carolina State University
- Dr. Herbert Wey - Chancellor
  Appalachian State University
- Dr. Albert N. Whiting - Chancellor
  North Carolina Central University

Other North Carolina Interviews

- Nathaniel N. Fullwood - Policy Advisor for Higher Education
- Governor Terry Sanford - President
  Duke University
- The Honorable Carl J. Stewart, Jr. - Speaker of the House
- Dr. Cameron P. West
  North Carolina Association of Independent Colleges and Universities
- Dr. J. P. Chesson, Jr. - President
  College of the Albermarle, Elizabeth City
- Robert W. LeMay, Jr. - President
  Wake Technical Institute, Raleigh
- Stuart Randolph
  William G. Enloe High School, Raleigh
- Mr. Murray A. Moyce
  Mrs. Enoch Smith
  Northeastern High School, Elizabeth City

Representatives of the Plaintiffs

- Jean Fairfax - Director
  Legal and Educational Defense Fund, Inc.
- John Silard, Esq. - Attorney for the Plaintiffs

Background

- Chester Finn - Legislative Aide to Senator Moynihan
- Dr. Miles Mark Fisher
  National Association for Equal Opportunity in Higher Education
- Dr. Charles Saunders - Director
  American Council on Education
- Sheldon Steinbach, Esq.
  American Council on Education

POSTSCRIPT

POSTSCRIPT

Adams v. Califano:
The Regulatory Process Continues

March 1979

The Adams case continues: federal agency and state higher education systems grapple with the difficult problems of eliminating duality. On February 2, 1978, Secretary Califano announced the HEW-OCR decision concerning the proposed state plans for the six states remaining subject to the court-ordered regulatory process in Adams v. Califano. HEW said three state plans were in compliance with the requirements of Title VI and the Adams criteria and were provisionally acceptable;* two plans were not acceptable** and one (North Carolina) was accepted in part and rejected in part. In that instance, HEW accepted the state plan for the community college system but rejected the plan submitted on behalf of the state's senior system, the sixteen institutions comprising the University of North Carolina. Each state whose plan was initially accepted by the agency has only one historically black institution within its state system.

In addition to this action the Secretary said that the Office for Civil Rights (OCR) would review eight other states' public systems of higher education to see whether they are in conformity with the Adams criteria. The states now under review are: Alabama, Delaware, Kentucky, Missouri, Ohio, South Carolina, Texas, and West Virginia. HEW was expected to announce some decision concerning these new states by December 1978, but no public announcement has yet been made.

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*The plans submitted by Arkansas, Florida, and Oklahoma were accepted.

**The plans submitted by Georgia and Virginia were rejected.

HEW gave the states whose plans were initially rejected a further 45-day negotiation period.* Thereafter, any state whose plan continued to be unacceptable to the agency would be subject to administrative hearing procedures leading to the termination of federal funds to the non-complying state systems. Furthermore, HEW suggested they would institute a "pin-point" deferral on future funding for affected states. Future fund requests submitted by the public institutions located in non-complying states would be deferred on a "selective basis." Only those new requests which would contribute to continuing segregation in such systems would be delayed, and student aid funds would not be affected.

During the winter of 1978, HEW continued to negotiate with the three states. HEW announced provisional acceptance of the plans submitted by Georgia and Virginia in March 1978. However, HEW began formal administrative enforcement proceedings against North Carolina on March 22, 1978, when negotiations failed to produce an acceptable plan by the March 20 deadline. As of that date, new requests for HEW funds from institutions in the UNC system were to be reviewed on a case-by-case basis. Califano stated:

> If the proceeding had been in effect in 1977, the department would have examined the $68 million in HEW funds that went to affected educational institutions in North Carolina and, according to OCR estimates, a maximum of $10 million might have been identified as contributing to continued segregation.**

Notwithstanding the enforcement proceeding, negotiations continued, and on May 12, 1978 Califano announced the North Carolina State Plan was provisionally accepted by HEW-OCR.

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*The NAACP-Legal Defense Fund has objected to this extension of the negotiation period and filed a motion with Judge Pratt "seeking a total cut-off of funds to the three state [rejected-plan] systems within 30 days" claiming the states should not "'illegally get multi-million dollar annual grants.'" (Chronicle of Higher Education, Vol. XV, No. 22 (February 13, 1978), p. 3.)

**Higher Education and National Affairs, March 24, 1978.

Each plan was provisionally accepted pending further study by each state of the particular problems involved with enhancing the black institutions and eliminating "unnecessary program duplication" between the traditionally white and traditionally black units in the state systems. As noted in the initial case study, these were the difficult issues that confronted the agency -- and states -- since the Adams criteria was announced. Each state was to submit further proposals for programs for the black colleges within six months.

As these periods for further study elapsed, each state wrestled with the problems of elimination of duplication and enhancement. The issues were further complicated by growing fiscal constraints and the down-turn in student enrollment. HEW-OCR had some difficult negotiations with almost every state. In December 1978, North Carolina completed a comparative study of baccalaureate and master's degree program offerings in six of the UNC institutions, which reviewed duplicative program offerings (111 duplicative offerings were studied) among the state institutions. The study was submitted to OCR and reviewed by Dr. Kenneth Clark, a consultant to OCR.*

By February 1979, HEW-OCR had granted final acceptance to five of the six State Plans. The final deadline for further negotiations with North Carolina was March 14, 1979. On March 26, 1979, Secretary Califano announced that the Department had failed to reach agreement on an acceptable state desegregation plan.

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*The New York Times, January 22, 1979: Dr. Clark reportedly was critical of the studies.

The New York Times
March 26, 1979

Califano Acts to End Carolina College Aid On Segregation Issue

By KAREN DE WITT
Special to The New York Times

WASHINGTON, March 26 — Joseph A. Califano Jr., Secretary of Health, Education and Welfare, today announced administrative action against North Carolina state-operated universities and colleges for continuing to run a racially segregated system of higher education.

Mr. Califano's action was the first step toward cutting off $10 million to $20 million worth of Federal aid. But the cutoff will not begin until 30 days from now, he said, so that the state can submit an acceptable desegregation plan.

"I take this action today as a last resort," Mr. Califano said at a news conference. He was responding to a contempt of court suit filed by the NAACP Legal Defense and Educational Fund Inc. He added, "I do so with enormous reluctance because I'm deeply committed to resolving complex desegregation matters through negotiations."

North Carolina is the only one of six Southern states to have faield to reach an acceptable desegregation plan with the H.E.W. Department. The others are Alabama, Florida, Georgia, Oklahoma and Virginia.

Termed Still 'Unequal'

Mr. Califano said the North Carolina system remains "largely separate and unequal" 25 years after the Brown v. Board of Education desegregation decision by the Supreme Court and nine years after his department first notified the state that its system of higher education was still racially segregated.

Eventually at stake will be some $90 million worth of Federal funds, but the state still can act within 30 days to prevent the loss of $20 million worth of Federal money.

Last May 12, H.E.W. and state officials announced a plan to desegregate the state university system, which consists of 11 predominantly white and 5 predominantly black institutions. It called for an increase in blacks at the white schools, strengthening of the black schools' facilities and curriculums, and the elimination of program duplications at black and white institutions in the same geographical areas.

Balked at Duplication Issue

State officials agreed to try to meet the first two goals but balked at the issue of duplication. Federal officials argued that program duplications encouraged white students to continue to register at predominantly white institutions and black students at mostly black ones, thus continuing the once legally segregated system.

On Dec. 11, North Carolina educational authorities, with the approval of Gov. James B. Hunt Jr., informed the H.E.W. Department that the 57 program duplications they had found would not be eliminated because they were educationally justified.

The department gave the state until March 14 to accept Federal desegregation guidelines or risk the loss of Federal education funds. In the interim, it offered a compromise on the duplication issue if the state would give black institutions, in the words of one Washington official, "unique, new programs" that would attract white students to them. The state refused and Mr. Califano took no immediate action when the deadline ran out.